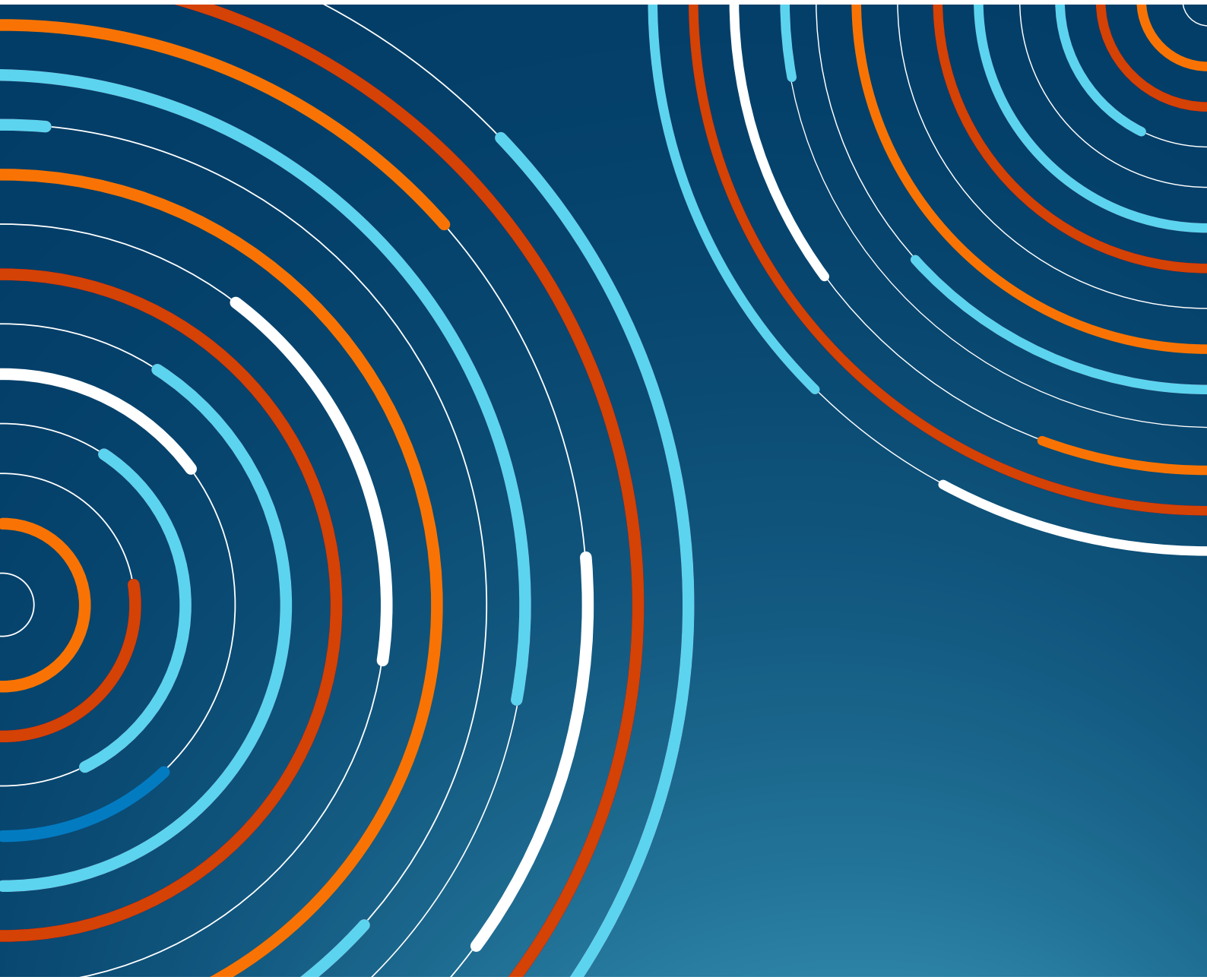
OECD Asia-Pacific Competition Law Enforcement Trends

2021



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Please cite this work as:

OECD (2021), *OECD Asia-Pacific Competition Law Enforcement Trends*, *https://www.oecd.org/daf/competition/oecd-asia-pacific-competition-law-enforcement-trends.htm*

Preface

Any market-based economy needs a competition law. The need for competition has been recognised since at least the time of Adam Smith, the founder of modern economics. Smith is well known for his view that individuals left to pursue their own interests will bring about the best economic outcome for the community as a whole. Less well known is his statement that the pursuit of self-interest will only work well if there is competition. If there is monopoly, he said, the pursuit of individual interest will work badly for the community as a whole.

Smith's views have been listened to around the world. Today, over 130 jurisdictions have adopted competition laws and jurisdictions in the Asia-Pacific area is no exception.

There is no more important or economically sizeable part of the world than Asia-Pacific. The combined population of the sixteen countries covered in this study makes up 48% of the world's population and produces almost 40% of the world's GDP.

The 16 jurisdictions in the Asia-Pacific region that have participated in this study all have a modern competition law, although newly minted in some cases. They have provided data to the OECD that presents key elements of their institutional approaches to competition enforcement and analyses the resources and enforcement activity of the competition authorities in the region.

The report shows that the legislative framework for the sixteen jurisdictions is similar to that of OECD countries. Essentially each law prohibits anti-competitive practices such as cartels, prohibits abuse of dominance and in most cases prohibits anticompetitive mergers. There is also often legislative recognition of the role of competition advocacy by competition authorities.

The report enables the comparison of the different stages of development of competition law in different jurisdictions. Some jurisdictions are mature operators of competition law. Some jurisdictions are at an intermediate stage. Others are 'young competition authorities'. It takes many years after the proclamation of a competition law for competition agencies to become fully fledged. To reach maturity they must build up staff and other resources, experience, and support from the courts and the government, often in the face of strong opposition from business interest groups. This report finds that the foundations of competition law have been solidly laid in almost all participating jurisdictions. Competition agencies are on the rise. They are not going to disappear. Nor would I expect them to weaken as time goes by. The experience of nearly every country in the world is that over time competition law becomes stronger and more important in the operation of the economy with governments and communities increasingly recognising their importance.

This pioneering research venture by the OECD is of great value in reporting on the state of competition law enforcement in each jurisdiction. It enables lessons to be drawn based on comparative analysis and it enhances the transparency of practices across jurisdictions.

In general, there is quite substantial and growing use of economists in nearly all jurisdictions. This bodes well for economic analysis playing a significant role in enforcement and advocacy matters into the future.

Mergers are a particularly challenging matter for all competition authorities, especially young ones. The study outlines how mergers are treated in the participating jurisdictions. It shows that the rates of approval, conditional approval and opposition to mergers do not differ greatly from the rates observed in OECD member countries.

The study also reveals that COVID-19 has had an impact on the practice of competition law in the Asia-Pacific. One of the lessons from the long history of competition law is that its long run development must not be thrown off track when a crisis like COVID-19 occurs. Promisingly, the data suggests that there has been a step up in agencies advocacy since the outbreak of the pandemic. This is encouraging. This study helps to confirm my belief that competition law will remain on track as the world seeks to recover from COVID-19.

I welcome this new research and its dissemination across the region to governments, business and the community.

Allan Fels

AO

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Foreword

This report identifies competition enforcement trends based on an analysis of data from 16 OECD and non-OECD jurisdictions in the Asia-Pacific region ("the region") from 2015 to 2020. It presents key elements of their institutional approaches to competition enforcement, and a unique analysis of the resources and enforcement activity of the competition authorities in the region.

The 16 jurisdictions that provided information on their competition enforcement activities and responded to both the OECD CompStats Database Questionnaire and the OECD-KPC questionnaire (OECD-KPC questionnaire) are Australia; Bangladesh; Brunei Darussalam; Chinese Taipei; Hong Kong, China; India; Indonesia; Japan; Korea; Malaysia; New Zealand; People's Republic of China; Philippines; Singapore; Thailand and Viet Nam.

By providing multi-year data on competition enforcement indicators, this publication supports informed policymaking and contributes to the continuous improvement of competition law and policy in Asia-Pacific.

It complements and draws from *Competition Law in Asia-Pacific: A Guide to Selected Jurisdictions* and *OECD Competition Trends*, an annual flagship publication that presents unique insights into global competition enforcement trends based on data from over 70 jurisdictions.

Acknowledgements

The publication was prepared by the OECD Competition Division, in particular a team composed of Wouter Meester, project leader; Aura García Pabón and Menna Mahmoud, who drafted the report; and Daniel Westrik, Rebecca Winter and Lukas Cavada who provided valuable analysis and input. The report was developed in close collaboration with Ruben Maximiano, OECD Senior Competition Expert and the Korea Policy Centre team, in particular Director General Jungwon Song. The report benefited from comments and suggestions on earlier drafts by Ori Schwartz and Antonio Capobianco, respectively Head and Deputy Head of the OECD Competition Division and Junheon Lee, Senior Competition Expert at the OECD Competition Division. The report was prepared for publication by Erica Agostinho.

We want to thank the individual competition authorities in the participating jurisdictions who generously provided the information on which much of this publication is based.

About The OECD/Korea Policy Centre

The joint OECD/Korea Policy Centre (OECD/KPC or the Centre) is an international co-operation organisation established between the OECD and the Korean government. The OECD/KPC's Competition Programme provides capacity building for competition officials and judges from the Asia Pacific region. It also undertakes research on competition law and policy issues of common interest in the region.

The Centre holds seminars and workshops on competition-related topics throughout the year, in addition to an annual workshop for judges. These workshops give participants the opportunity to share their experiences in the competition field with their peers, as well as judges, from both the Asia Pacific region and other parts of the world.

Expert practitioners from established agencies in the region, as well as from OECD member countries, share their experiences and best practices at workshops on topics such as: competition advocacy, cartels, abuse of dominance and merger control.

The OECD/KPC therefore plays a pivotal role in ensuring that younger competition jurisdictions learn from the best practices and vast experience of OECD members in the region (Australia, Japan, Korea and New Zealand) and elsewhere.

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Executive Summary

This report identifies some main competition enforcement trends in the Asia-Pacific region. It presents insights into regional competition trends based on analysis of data from 16 OECD and non-OECD jurisdictions from 2015 to 2020. Multi-year data on competition enforcement indicators can support informed policymaking and contributes to the continuous improvement of competition law and policy in Asia-Pacific.

Over the past 20 years, Asia-Pacific has witnessed a remarkable increase in the importance of competition policy and law in the region. In a substantial part of the region, competition laws have been introduced relatively recently or extensively amended, showing an increased importance of competition law and policy. At the same time, the region includes a number of competition law regimes that have been in existence for over 30, 40 or 50 years, or (in one case) even more than a century. This includes, but is not limited to, the four OECD member countries in the region; Australia, Japan, Korea and New Zealand. As a result, the Asia-Pacific region shows a large diversity in competition enforcement experience with the presence of young agencies as well as more developed and very experienced authorities.

A result of the growing importance of competition policy in the region is the increasing amount of resources available to the relevant authorities. Most Asia-Pacific jurisdictions have increased their resources, both in terms of budget as well as staff count. In the past six years, the average budget for competition matters of the authorities in the region increased by almost 23% in real terms (or a compound annual growth rate of 3.4%), while staff at the competition authorities (working on competition) increased by almost 24% (or a compound annual growth rate of 3.6%).

When looking closer at competition enforcement activity in Asia-Pacific, average numbers are generally heavily influenced by a small number of the more experienced authorities. Younger authorities often show lower levels of competition enforcement, as they are, understandably, prioritising building their capacity to implement their competition law and policy, while trying to establish a competition culture in the jurisdiction through advocacy activities. Indeed, such younger competition authorities in Asia-Pacific have frequently used market studies as a tool to screen industries and build knowledge that may be relevant to identify sectors for possible future enforcement activity or make recommendations for governments to make markets work better.

Several jurisdictions in the region have still a limited enforcement record. This is particularly evident for abuse of dominance and cartel enforcement. Almost half of the jurisdictions in Asia-Pacific (7 out of 16) had not issued an abuse of dominance decision in the years 2015-20. Similarly, with regards to cartels, two jurisdictions were responsible for almost 80% of all decisions in the region in 2020, while four jurisdictions included in the analysis reported one decision, and another four jurisdictions had zero decisions in the same year. Moreover, while the majority of jurisdictions in the region has adopted a leniency programme (also referred to as immunity or amnesty programmes), leniency applications themselves are highly concentrated in only a few jurisdictions. Further, while a substantial amount of fines were imposed in the years 2015-20 in the region, these fines were mainly driven by a few jurisdictions.

An enforcement area that has shown significant (and increasing) activity across the entire region is merger control; the review of mergers and acquisitions for their potential impact on competition in markets. Almost all of the jurisdictions in Asia-Pacific have a merger control regime in force, although their design differs. Most have a mandatory pre-closing notification regime, while several have chosen advisory, voluntary pre-merger notifications that are often combined with mandatory post reviews. While the more experienced jurisdictions were responsible for most merger notifications, some of the less developed jurisdictions have shown the largest percentage increase in the past years. Finally, close to 98% of the mergers reviewed in the region in 2020 were considered not to have an anti-competitive effect and were cleared in phase I without remedies, including the ones cleared in jurisdictions with a single-phase regime (versus 93% in the rest of the world). In line with what is found in many other jurisdictions globally, merger interventions (remedies or blocking mergers) rarely take place in Asia-Pacific.

Two additionally important developments are also addressed in this report, as they (can) significantly affect competition enforcement in the region in the years to come. The first is the increased importance of economic analysis for competition enforcement in Asia-Pacific (and around the world). Economic analysis provides an analytical framework for the analysis of markets, market failures, levels of competition and competitive outcomes from conduct, agreements and transactions. As such, economic analysis allows the different legal regimes in the region (and beyond) to converge by applying a similar framework of analysis. The use of economics within the region is still beginning and laws and guidelines often provide for relatively fundamental economic analysis. The presence of economists in the different competition authorities varies widely (both in number as well as in percentage of total staff), but generally stays below the OECD average. However, this may change in Asia-Pacific with the development of the various younger competition enforcement regimes.

The second development is the impact of the COVID-19 pandemic on competition enforcement, and the role that competition law and policy can play in the recovery from the pandemic. The way in which jurisdictions have responded to contain the pandemic and mitigate its economic impact differs significantly around the world, although most jurisdictions have introduced societal restrictions. In any scenario, competition principles and competition authorities can play a fundamental role in assisting governments in its economic recovery from the COVID-19 pandemic. Ways in which competition authorities can support include (i) advising governments how to avoid competition distortions when designing support measures, (ii) proposing pro-competitive structural reforms, (iii) redirecting enforcement resources towards strategic markets and industries and (iv) sanction anticompetitive infringements and regulate mergers that may exacerbate the consequences of the crisis or hold back the economic recovery. Indeed, most competition authorities in the region reported their active involvement in the effort to recover from the COVID-19 pandemic.

1 Introduction

Over the past 20 years, Asia-Pacific has witnessed a remarkable increase in the importance of competition law and policy in the region. Several jurisdictions established their first competition law and policy regime, while others implemented substantial changes to their existing regime, for instance to widen the scope of their laws or increase competition enforcement powers. The regimes that underwent such changes in their competition law and policy have benefited greatly from good practices and vast experience of competition authorities in OECD jurisdictions, and in particular from the authorities in OECD jurisdictions in the region (Australia, Japan, Korea and New Zealand) and the OECD-KPC Competition Programme that has held events for more than 3 000 participants in the region since 2004.

This report identifies some main competition enforcement trends in the Asia-Pacific region. It presents unique insights into regional competition trends based on analysis of data from 16 OECD and non-OECD jurisdictions from 2015 to 2020. By providing multi-year data on competition enforcement indicators, this publication supports informed policymaking and contributes to the continuous improvement of competition law and policy in Asia-Pacific. The data analysed includes mainly 16 jurisdictions in the Asia-Pacific region that have provided complete data to the OECD on their competition enforcement activity[1] and have responded to the OECD-KPC questionnaire sent for the purposes of the present report (see Figure 1.1).

Figure 1.1. Asia-Pacific jurisdictions in the OECD CompStats database

Note: The included jurisdictions are (in alphabetical order, counter clock wise): Australia; Bangladesh; Brunei Darussalam; Chinese Taipei; Hong Kong, China; India; Indonesia; Japan; Korea; Malaysia; New Zealand; People's Republic of China; the Philippines; Singapore; Thailand and Viet Nam.

[1] The jurisdictions that have provided information on all years within the observed period (2015-20) have been included in the OECD CompStats Database. This database compiles responses from participating jurisdictions to the OECD Competition Basic Statistics Questionnaire on competition enforcement activity, covers 73 jurisdictions, 34 variables and six years (2015-2020). In 2021, the database includes 16 jurisdictions from the Asia-Pacific region. The OECD-KPC questionnaire included a number of additional questions specific to main trends in the region.

These 16 jurisdictions cover approximately 88% of the population in the Asia-Pacific region[2] and approximately 48% of the world population. Moreover, they cover approximately 95% of the GDP of the region and almost 39% of the world's GDP.

The remainder of the report is divided into four parts. Chapter 2 describes the growing importance of competition law and policy in Asia-Pacific and includes general competition statistics and competition enforcement trends in the region. Chapter 3 looks more closely at the different types of merger control regimes in Asia-Pacific, including merger control activity and the use of economics in merger review. Chapter 4 focuses on the use of economics as an increasingly important analytical framework for competition cases, and analyses to what extent and how this framework has been implemented in Asia-Pacific. Chapter 5 elaborates on the impact that the COVID-19 pandemic has had on competition enforcement in Asia-Pacific.

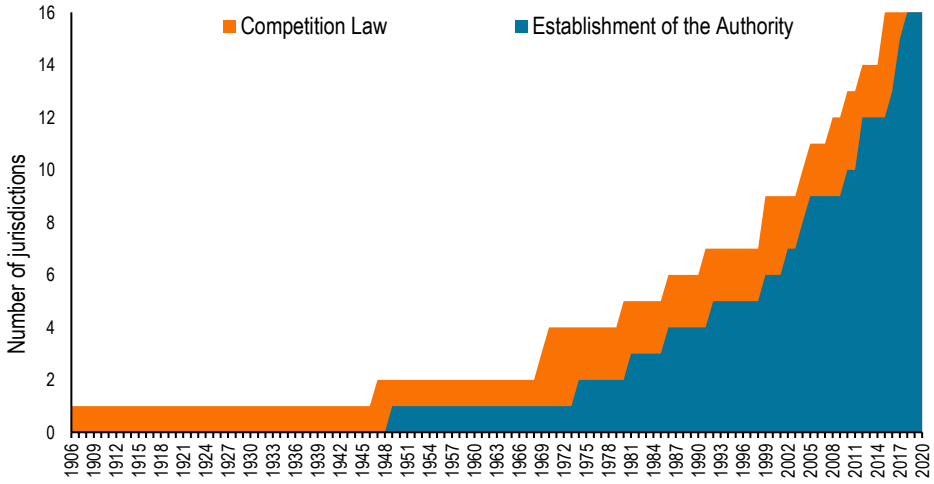
[2] The geographic span of the Asia-Pacific region can vary, depending on the context. For the purposes of the use of World Bank data for this report, Asia-Pacific is assumed to include Southern Asia, Eastern Asia, South Eastern Asia, Australia and New Zealand according to World Bank's groupings. The sources used for GDP and population are the World Bank World Development Indicators and World Bank Population database [Source: https://databank.worldbank.org/source/world-development-indicators].

2 Growing Importance of Competition Law and Policy in Asia-Pacific

Increasing competition law and policy regimes in Asia-Pacific

Over the past decade, the presence and importance of competition law and policy have shown a remarkable growth in Asia-Pacific. Several new competition laws have been adopted, establishing new regimes or changing existing ones, and new authorities have been established (see also Figure 2.1).

Figure 2.1. Year of introduction of competition law and the establishment of the competition authorities in Asia–Pacific



Note: Based on data from the 16 jurisdictions in OECD CompStats database in the Asia-Pacific region.
Source: OECD analysis based on publicly available information.

From our subset of 16 jurisdictions, 7 introduced a competition law regime between 2000 and 2020[3] while 10 new competition authorities were established in the same period.[4] The average age of the 16 authorities in the region is currently 21.4 years.

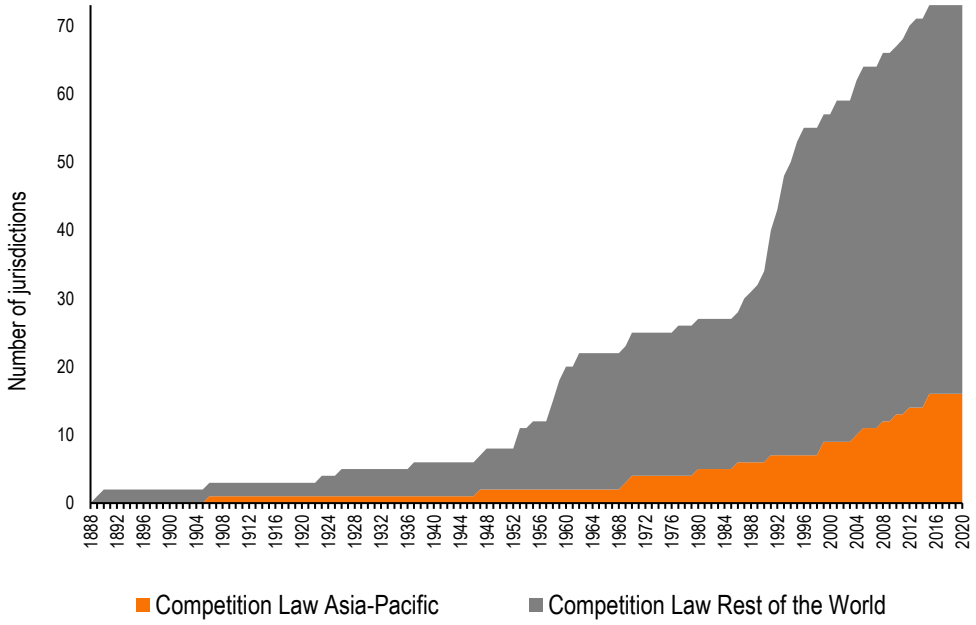
[3] Namely Singapore (2004); Viet Nam (2005); the People's Republic of China (2008); Malaysia (2010); Hong Kong, China (2012); Brunei Darussalam (2015); and the Philippines (2015).

[4] Namely India (2002); Viet Nam (2004); Singapore (2005); Malaysia (2010); Bangladesh (2012); Hong Kong, China (2012); the Philippines Competition Commission (2016); Thailand (2017) and the Competition Commission Brunei

Several other jurisdictions in the region (which are not included in the OECD CompStats database and therefore not part of the subset of 16 analysed jurisdictions) also enacted their first competition law in recent years. Such jurisdictions include French Polynesia[5], Lao People's Democratic Republic[6] and Myanmar[7], all in 2015, and Cambodia (in 2021). With the adoption of its first competition law on October 5th, 2021, Cambodia was the last jurisdiction in the Association of Southeast Asian Nations (ASEAN) to enact its competition law, expected to enter into force in 2022.[8]

This wave of new regimes and competition authorities in Asia-Pacific in recent years follows a global trend of increasing competition law around the world (see Figure 2.2 and (OECD, 2020, p. 11[1])).

Figure 2.2. The evolution of competition law in Asia–Pacific and the rest of the world



Note: Based on data from the 73 jurisdictions in OECD CompStats database.
Source: OECD CompStats database and OECD analysis based on publicly available information.

Competition authorities of the jurisdictions included in the analysis differ substantially in many ways, including the authorities' main functions and responsibilities. Out of the 16 jurisdictions included in our analysis, almost half of the authorities fulfil other responsibilities as part of their mandates, besides enforcing the competition law, such as consumer protection, regulatory powers in specific sectors, public procurement or others (see Figure 2.3).

Darussalam (2017). Moreover, in 2018, the People's Republic of China formed the State Administration for Market Regulation by consolidating three ministerial departments. The State Administration for Market Regulation in the People's Republic of China consolidates in one ministry the market regulation functions previously shared by three separate ministries: the General Administration of Quality Supervision, Inspection and Quarantine, the China Food and Drug Administration, and the State Administration of Industry and Commerce.

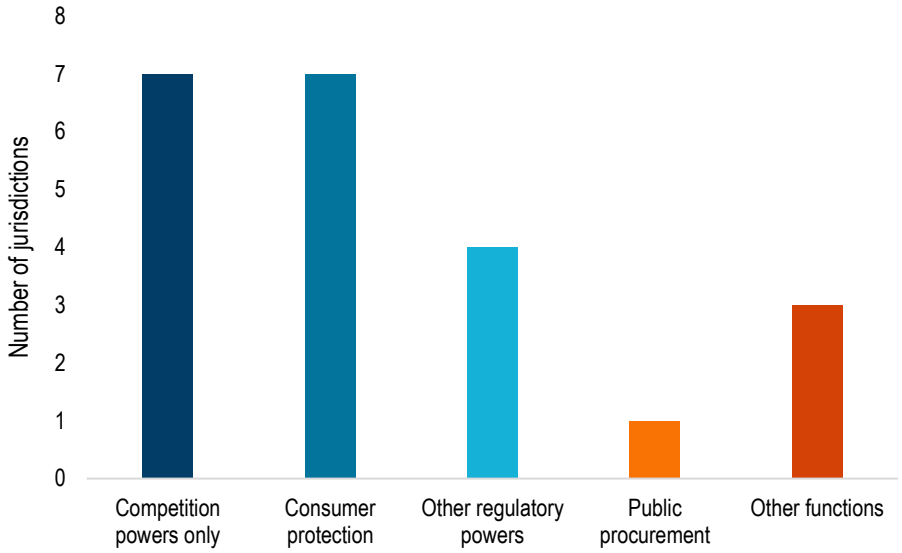
[5] Loi du Pays No. 2015 – 2 relative á la concurrence.

[6] Lao People's Democratic Republic Law No. 60 of 2015: Law of Competition.

[7] The Competition Law 2015 from the Republic of the Union of Myanmar.

[8] Cambodia Competition Law 2021. Available at https://www.coj.gov.kh/wp-content/uploads/2021/10/L1021-013.pdf

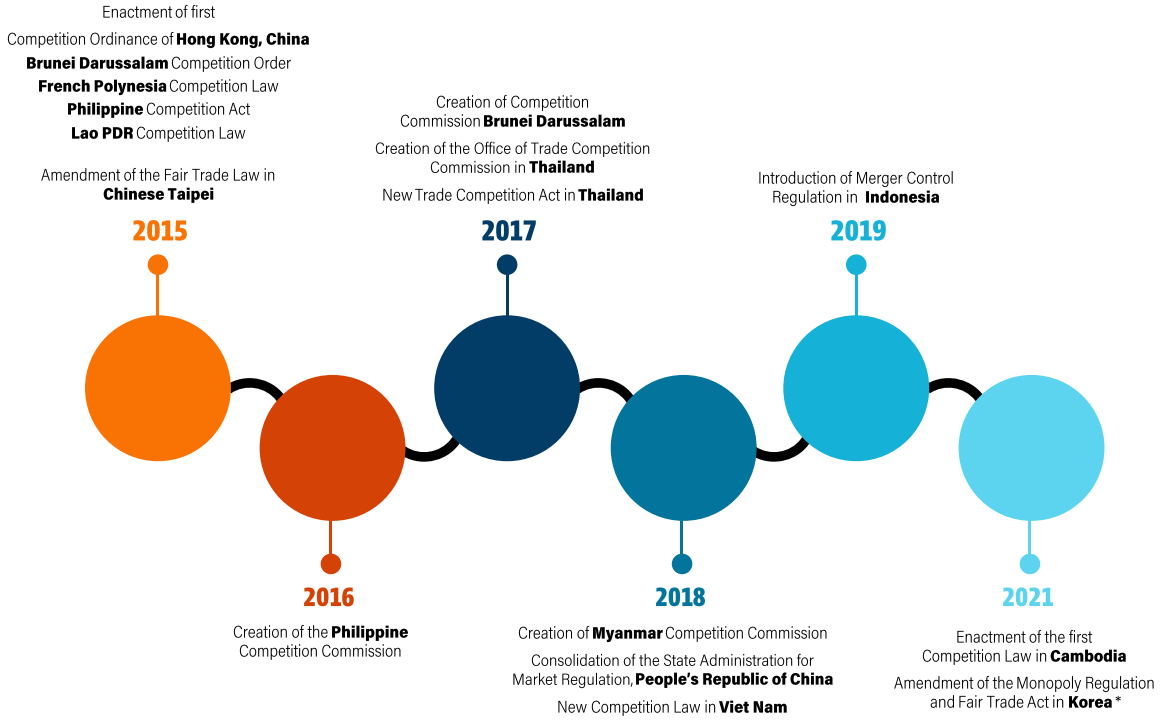
Figure 2.3. Functions of the Competition Authorities in Asia-Pacific



Note: Data from the 16 jurisdictions in OECD CompStats database in the Asia-Pacific region. The bars do not necessarily add up to 16 as some authorities may have more than one function.
Source: OECD Analysis based on Public Information

Beside new competition law regimes, there have also been jurisdictions that significantly amended existing competition laws and regulations, for instance, to widen the scope of their laws or increase competition enforcement powers. Examples are the Competition Ordinance that Hong Kong, China issued in 2015; the Fair Trade Law of Chinese Taipei, substantially modified in 2015; the Trade Competition Act in Thailand in 2017, which replaced the same act from 1999; and the Competition Law in Viet Nam No. 23 of 2018 that replaced their Competition Law from 2004. Figure 2.4 summarizes some of the major milestones in competition law and policy in Asia-Pacific in the past six years. This is followed by a brief discussion of these significant changes.

Figure 2.4. Introduction of new competition laws, extensive amendments to existing ones, and the establishment of new competition authorities in Asia-Pacific between 2015 and 2021



Note: The amendments of the Monopoly Regulation and Fair Trade Act in Korea are expected to enter into force by 30 December 2021.
Source: OECD analysis based on publicly available information.

In Hong Kong, China, the Legislative Council passed the Competition Ordinance (Ordinance) in June 2012, which took effect on 14 December 2015 and established its first cross-section competition law regime[9]. The Competition Commission, created by the Ordinance, started its activities in October 2014, mainly focusing on conducting advocacy activities to inform the public, including the development of market studies and the issuance of guidelines. The Ordinance also established a Competition Tribunal that has as its primary responsibility to hear and adjudicate competition-related cases, as well as to review certain decisions of the Competition Commission. The Communications Authority in Hong Kong also has jurisdiction with respect to anti-competitive conduct of undertakings operating in the telecommunications and broadcasting sectors[10]. Unlike merger control regimes in other jurisdictions, the Merger Rule applies only to mergers involving a telecommunications carrier license.

The Fair Trade Act of Chinese Taipei (CTFTA) was originally enacted in February 1991 and effective since February 1992, but greatly amended in 2015. Those amendments covered a wide range of legal provisions, such as merger control and cartel enforcement, having a significant impact on the activity of the Chinese Taipei Federal Trade Commission (CTFTC). One of the main substantive changes introduced was the possibility to use economic evidence to infer collusive agreements. This means that any concerted action may be presumed by factors, such as market conditions, characteristics of the good or service, cost and profit considerations,

[9] Hong Kong, China Competition Ordinance, full text available at: https://www.elegislation.gov.hk/hk/cap619!en@2018-04-20T00:00:00

[10] Article 159 of the Hong Kong, China Competition Ordinance.

and economic rationalization of the business conducts[11]. The amendments also allow for an exemption in cartels that facilitate industrial developments, technological innovation, or business efficiencies[12].

Another relevant modification was the introduction of vertical restraints as restrictive on competition, which were only considered before as acts of unfair competition[13]. On procedures in cartel enforcement, the amendments readjusted fines[14]; introduced a termination system, authorising the CTFTC to terminate investigations with commitments from the defendants[15]; extended the statute of limitations for investigations from three to five years[16], among others.

The main changes in the merger regime included expanding the business turnover calculation for filing pre-merger notifications to include those held and owned by the subsidiaries affiliated with the same parent companies as the merging parties. It also implied modifications in the review period, mainly in the possibility to extend the original one with additional 60 days; and gave the CTFTC powers to publish different turnover thresholds applicable to different industries[17].

Thailand also introduced substantial changes to their competition regime in 2017[18]. Although the Trade Competition Act (TCA) was enacted in 1999, its enforcement was delegated to a Department of Internal Trade in the Ministry of Commerce, which had other responsibilities and did not in practice give priority to competition enforcement. One of the priorities of the new TCA 2017 was the establishment of an independent competition authority, the Office of the Trade Competition Commission (OTCC) as an administrative body and the Trade Competition Commission (TCC) as its decision-making executive board. Another relevant change was the inclusion of state-owned enterprises within the scope of the Competition Law, excluding those created to benefit national security and the public.

Regarding anti-competitive conducts, a major change included the separation of provisions and liabilities for hard-core cartels and non-hard-core cartels. The former are subject to criminal penalties, while the latter are only subject to administrative fines.

With respect to the merger regime, the TCA 2017 now provides for both a pre-merger approval and post-merger notification. Mergers that may result in a substantial reduction of competition must be reported within seven days from the date of the merger, while mergers that may result in a monopoly, or a dominant business operator, must obtain prior approval[19]. In advocacy matters, the TCA2017 introduced the possibility for the Authority to issue opinions to the Government regarding policies that may distort competition[20].

In Viet Nam, the Competition Law No. 23 of 2018 (the New Law) replaces the 2004 Competition Law. In general, there has been a shift towards a more effects-based analysis (OECD, 2018[2]). The New Law stressed a separation between some conducts (hard-core cartels) that are prohibited *per se*, regardless of the combined market shares of the cartelists, and others (such as the vertical agreements), that will be

[11] Article 14 of the Chinese Taipei Fair Trade Act (2015).

[12] Article 15 of the Chinese Taipei Fair Trade Act (2015).

[13] Articles 19 and 20 of the Chinese Taipei Fair Trade Act (2015).

[14] Article 40 of the Chinese Taipei Fair Trade Act (2015).

[15] Article 28 of the Chinese Taipei Fair Trade Act (2015).

[16] Article 41 of the Chinese Taipei Fair Trade Act (2015).

[17] Article 11 of the Chinese Taipei Fair Trade Act (2015) amended in June 2017.

[18] Trade Competition Act B.E. 2560 of 2017 (TCA 2017).

[19] Section 51 of the TCA 2017.

[20] Sections 17 and 18 of the TCA 2017.

prohibited only if they cause or have the ability to cause a significant restraint in competition in the market[21]. The latter applies also when investigating abusive conducts[22].

The merger regime under the New Law also follows the same effects-based approach. Before the amendments, if the combined market share of enterprises in mergers accounted for over 50% of the relevant market, the transaction was prohibited without the need to consider other factors. Under the New Law, a merger may only be prohibited if the merger would result in a significant anti-competitive effect on a market in Viet Nam[23]. This new legislative framework strengthens the promotion of competition and has led to an improvement in the business environment in Viet Nam (OECD, 2020[3]).

In December 2020, the Korean National Assembly passed amendments of the Monopoly Regulation and Fair Trade Act (MRFTA) and the amended law is expected to come into force by the end of 2021[24].

Among the main changes, it increased the scope of the merger review, by creating a new test for merger notification that relies on the value of the transaction and the companies' presence in Korea. This latter considers the sales of the companies in the Korean markets and their R&D activities and budget. It also increased the limits of administrative fines for anti-competitive practices. Moreover, information exchanges amongst competitors regarding variables such as prices and output became an illegal conduct with a presumption of an agreement in place. Besides, the amendments introduced the right of parties harmed by unfair practices to seek relief at court against such conduct, as well as some other adjustments regarding the grounds for revoking leniency benefits and due process rights.

There are some ongoing reviews in the region that include Malaysia, which mainly looks to introduce a horizontal merger regime (OECD, 2019[4]). Moreover, the People's Republic of China also published recently a major draft amendment of their Antimonopoly Law, with the main changes targeting digital economies and covering anti-competitive agreements, vertical restraints and mergers[25].

[21] Article 12 of the Competition Law No. 23 of 2018.

[22] Article 27 of the Competition Law No. 23 of 2018.

[23] Articles 30 and 31 of the Competition Law No. 23 of 2018.

[24] Korea Federal Trade Commission, Press Release All amendments to the Fair Trade Act passed by the National Assembly, 9th December, 2020. Available at: http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpttype=1&report_data_no=8868

[25] National People's Congress of the People's Republic of China, "Draft Amendment to the Anti-Monopoly Law" (released on October 25, 2021), available at http://www.npc.gov.cn/flcaw/flca/ff8081817ca258e9017ca5fa67290806/attachment.pdf.

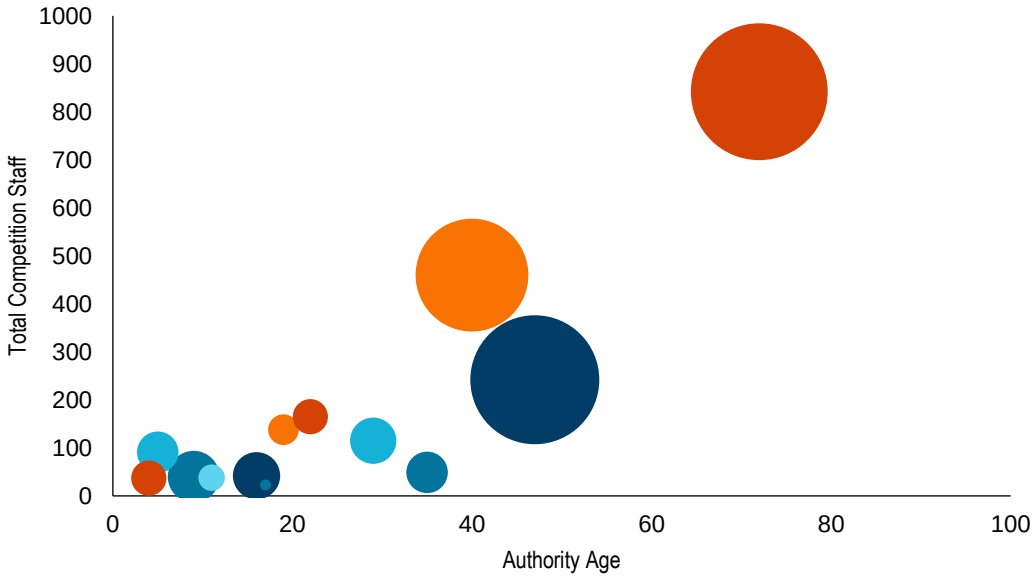
Resources of Competition Authorities in the Region

The data shows that jurisdictions in Asia-Pacific have significantly increased their resources in terms of budget and staff. In the past six years, the average competition budget has increased by 22.7% or a compound annual growth rate (CAGR) of 3.4%. This was more or less on par with the OECD CAGR of 3.5% for the same period[26]. Moreover, staff working on competition has increased by 23.7% or a CAGR of 3.6%[27]. This significantly exceeded the OECD CAGR of 1.5% for the same period.

Available competition resources (competition budget and competition staff) in Asia-Pacific vary considerably within the region. Reasons for this include the diverse age mix of authorities (with some well-established and experienced ones as well as very recently established ones) and economic factors such as the size and income-level of the jurisdictions.

Figure 2.5 shows that there seems to be a positive relationship between the age of the authority and its available budget and staff.

Figure 2.5. Average budget, staff and age of the authorities in Asia-Pacific, 2020



Note: Data based on the 15 jurisdictions in Asia-Pacific the CompStats database that provided comparable data for all six years. Budget figures are in 2015 EUR (non-euro currencies are converted using 2015 official exchange rates on 31 December 2015) to eliminate currency fluctuations distorting budget changes. The size of the bubbles indicates the nominal value of the budget of each jurisdiction.
Source: OECD CompStats Database.

[26] These growth rates on resources used by the competition authorities from OECD jurisdictions were calculated based on a sample of 62 jurisdictions from the region that provided complete information for all six years on their budget and 65 jurisdictions from the region that provided complete information for all six years on their competition staff.

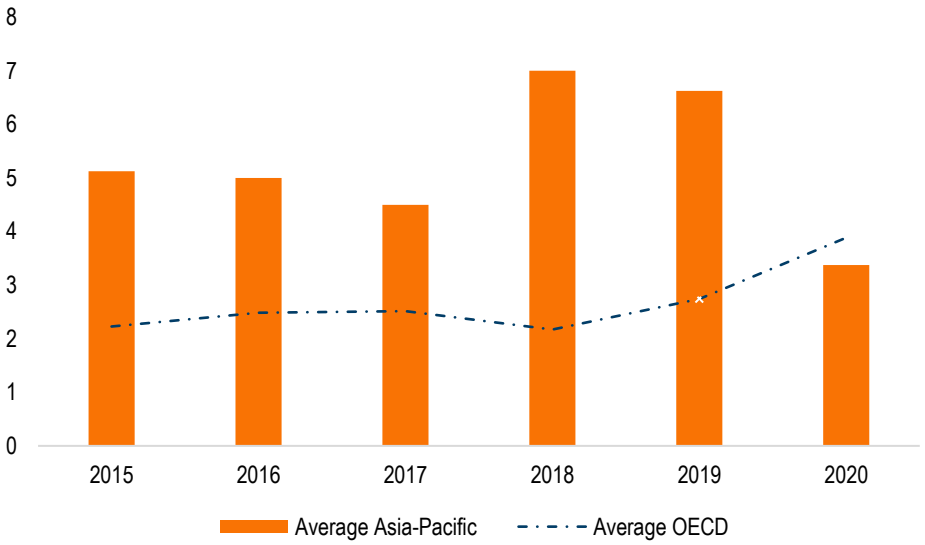
[27] These growth rates on resources used by the competition authorities in Asia-Pacific were calculated based on a sample of 11 jurisdictions from the region that provided complete information for all six years.

Advocating for Competition

As mentioned above, Asia-Pacific includes a mix of well-established, experienced competition authorities, including those from OECD member countries (Australia, Korea, Japan, and New Zealand), and younger authorities. For many of these younger authorities, enforcement activities are still relatively low, as their focus and priorities lie in advocacy and creating a culture of competition. Many are adapting and adjusting to new policy goals and assignments of functions in their laws, responding to circumstances and priorities as well as investing resources in advocacy and establishing a competition culture (Kovacic and Lopez-Galdos, 2016[5]).

Young authorities in Asia-Pacific frequently use market studies as a tool to screen industries, build knowledge and ensure effective competition in those markets. During the period 2015 to 2020, an average of 5.3 market studies per jurisdiction was finalised each year in the region[28] (see Figure 2.6). On average, the Asia-Pacific jurisdictions have used market studies more frequently than the OECD countries, except for 2020.

Figure 2.6. Average number of market studies per year per jurisdiction in Asia-Pacific and OECD, 2015-2020



Note: Data for Asia-Pacific relates to the 8 jurisdictions in the OECD CompStats database for which comparable data are available for all years. The OECD average includes 35 jurisdictions.
Source: OECD CompStats Database.

[28] These totals and averages on market studies finalised were calculated based on a sample of eight jurisdictions that provided complete information for all six years.

Box 2.1. Market studies in Asia-Pacific: the e-commerce sector

Authorities in Asia-Pacific make significant use of market studies to understand markets and their functioning, as well as to identify and diagnose emerging competition issues, from structural features of the market to firm conduct. Market studies can present or recommend solutions to mitigate consumer harm before it becomes significant, promote further competition, and help reduce the likelihood of violations of competition rules.

Even though authorities in the region perform market studies in multiple and diverse sectors, they have recently increasingly focused their studies on the digital economy. For example, in 2020, the competition authorities of India, Malaysia and Singapore launched market studies related to e-commerce.

The Competition Commission of India (CCI) conducted a study to understand the functioning of ecosystems where platforms played a key role[1]. Particularly, the authority focused on new distribution methods, business practices and contractual provisions and the identification of potential barriers to competition to set advocacy priorities for the CCI in this sector. Among the resources used, the CCI performed surveys, focused group discussions, and meetings with stakeholders, including a workshop and written submissions. According to the CCI, the study, launched in January 2020, helped gather useful insights and information on the key features of e-commerce in India, the different business models of e-commerce players, and the various aspects of commercial arrangements between market participants involved in e-commerce. The main competition concerns identified in the report related to the potential lack of neutrality of e-commerce platforms and lop-sided contracts between platforms and their business users[2].

The Competition and Consumer Commission of Singapore (CCCS) also published, in September 2020, a study on the E-commerce Platforms Market[3]. The study was dedicated to gaining an in-depth understanding of the business models and operating environment of e-commerce platforms, as well as identifying certain areas where further clarity and guidance by CCCS could be beneficial to assist businesses in the application of their competition law in the digital space. As a result, the CCCS announced future updates to their competition guidelines to consider the main findings from the study. The potential updates include clarifications on market definition when there exist multi-sided platforms, the assessment of market power and abuse of dominance including new relevant factors such as the control of data, and the assessment of mergers and acquisitions in cases where there are important innovators, even if they do not have a large market share.

Finally, the Malaysia Competition Commission (MyCC) published, in August 2020, its findings and recommendations contained in a Market Review for Service Sector in Malaysia[4]. According to the study, its main purpose was to better understand the market structure and to assess market conducts in the wholesale and retail trade for four selected products, namely processed food and beverages; personal care and toiletries; household cleaning products; and clothing[5]. Even though the study was not explicitly focused on e-commerce as the previous two, the report findings identified concerns related to competition due to the shift in purchasing habits of Malaysian consumers towards digital and e-commerce platforms. For the MyCC, industry players are neither efficient nor equipped enough to deal with this emerging trend; hence, suggesting structural policies to facilitate the adoption of e-commerce strategies, particularly by small and medium enterprises, among other recommendations.

Notes:
[1] Market Study on E-Commerce in India: Key Findings and Observations. Available at: https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-inIndia.pdf
[2] OECD (2020). Using Market Studies to Tackle Emerging Competition Issues – Contribution from India. Available at: https://one.oecd.org/document/DAF/COMP/GF/WD(2020)24/en/pdf
[3] CCCS E-commerce platforms market study report. Available at: https://www.cccs.gov.sg/-/media/custom/ccs/files/media-and-publications/publications/market-studies/cccs-ecommerce-platforms-market-study-report.pdf
[4] MyCC Market Review under the 2010 Act for Service Sector in Malaysia. Available at: Final Report: Market Review under the Competition Act 2010 for Service Sector in Malaysia (Wholesale and Retail for Selected Products) | Malaysia Competition Commission (MyCC)
[5] MyCC Press Release of the Market Review under the 2010 Act for Service Sector in Malaysia. Available at: https://www.mycc.gov.my/sites/default/files/pdf/newsroom/Market%20Review%202020%20-%20Press%20Release%20%28ENG%29.pdf

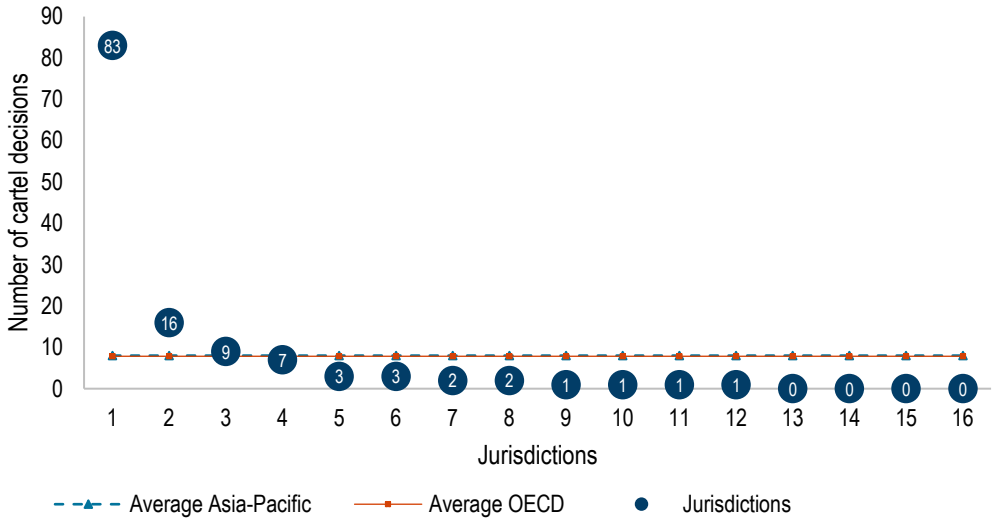
Competition enforcement in Asia-Pacific

As seen above, many changes in competition regimes in Asia-Pacific have taken place in the past two decades, this section will discuss competition enforcement in the region in the period 2015-2020. With regards to competition enforcement, several jurisdictions are still developing their enforcement capacity.

Cartels and anti-competitive agreements

With regards to anti-competitive agreements, an average of 8 decisions were taken in 2020 in Asia-Pacific[29], although this average was significantly driven by two jurisdictions that were responsible for 77% of the decisions, while four other jurisdictions reported zero decisions taken (see also Figure 2.7). The median number of cartel decisions for 2020 was two for Asia-Pacific, against three for OECD jurisdictions. This high concentration of cartel decisions in a few jurisdictions is also observed for the entire period 2015-2020, where the median number of cartel decisions was 3.9 for Asia-Pacific, compared to an OECD median of 4.3.

Figure 2.7. Average number of cartel decisions per year per jurisdiction in Asia-Pacific and the average for the OECD, 2020



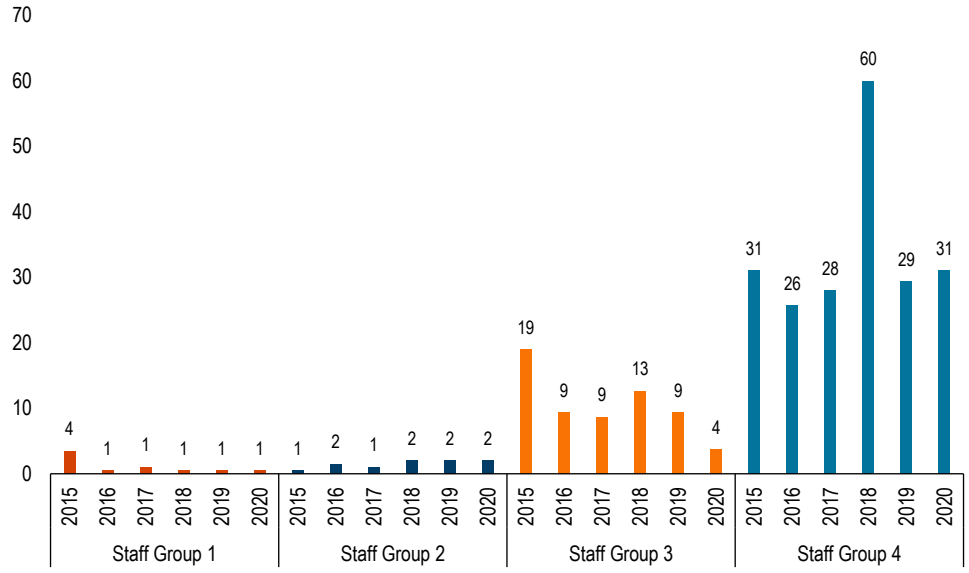
Note: Data from the 8 jurisdictions in OECD CompStats database in the Asia-Pacific region for which comparable data are available for all years.
Source: OECD CompStats database.

As explained above, the cartel enforcement is highly concentrated in a few jurisdictions, a complementary classification is used to study how the number of staff employed may affect the enforcement activity of an authority. Figure 2.8 shows that the cartel decisions are mostly taken by the jurisdictions that have a significant number of competition staff employed. Moreover, staff-group 4[30] had significantly increased its average cartel decisions taken in 2020 by 5.7% (compared to 2019), while the lower staff-groups had a stable and/or decreasing trend in the average number of cartel decisions in 2020.

[29] This average was calculated based on the 16 jurisdictions that reported information on cartel decisions for 2020.

[30] Competition staff-group 1 has competition staff less than or equal 40, staff-group 2 has staff employed greater than 40 but less than or equal 100, staff-group 3 has competition staff greater than 100 but less than or equal 200, staff-group 4 exceeds 200 competition enforcers.

Figure 2.8. Average number of cartel decisions by staff group in Asia-Pacific, 2015- 2020

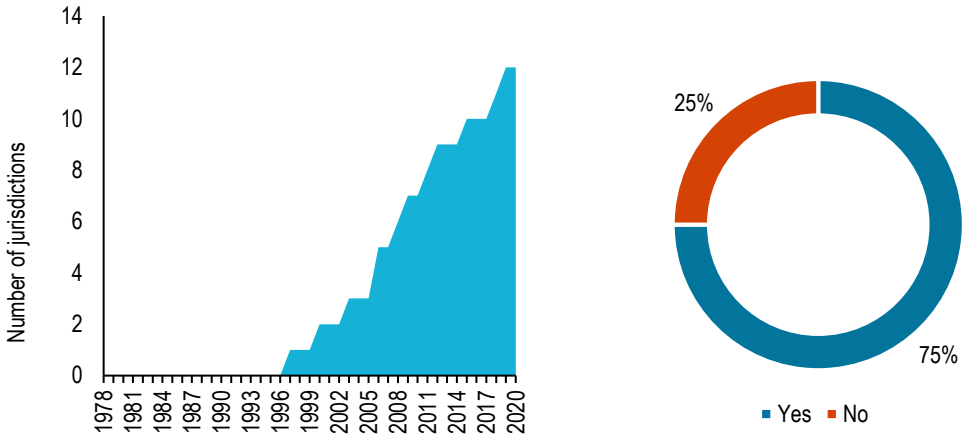


Note: Data based on the 10 jurisdictions in Asia-Pacific in the CompStats database that provided data for all six years. Competition staff is staff working only on competition (excluding administrative staff or staff involved in other functions of the authority, such as consumer protection, public procurement, sector regulation). Groupings are based on staff numbers provided in 2020. Competition staff-group 1 has competition staff less than or equal 40, staff-group 2 has staff employed greater than 40 but less than or equal 100, staff-group 3 has competition staff greater than 100 but less than or equal 200, staff-group 4 exceeds 200 competition enforcers.
Source: OECD CompStats Database.

One of the tools used by competition authorities around the world to detect cartels is leniency programmes (sometimes also referred to as immunity or amnesty programmes; hereinafter jointly referred to as leniency programmes). They give cartel members the option to report their conduct and provide evidence of its existence, in exchange for immunity in sanctions or even from proceedings and prosecution.

While the first leniency programme in the world was introduced in 1978, most jurisdictions adopted a leniency programme in the last 20 years. This has also been the case in Asia-Pacific, where the first leniency programme was introduced in 1997 and 10 of the existing 12 leniency programmes in the region were introduced after 2000. This means that 75% of the jurisdictions in our sample have now a leniency programme in force (see Figure 2.9).

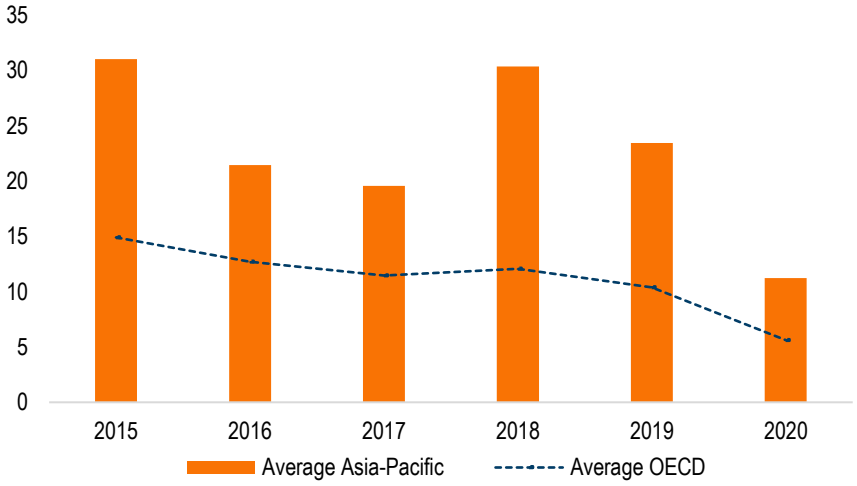
Figure 2.9. Year of introduction of leniency programmes in Asia-Pacific (left) and percentage of Asia-Pacific jurisdictions with a leniency programme in force (right)



Note: Data from the 16 jurisdictions in OECD CompStats database in Asia-Pacific.
Source: OECD Analysis based on Public Information

The average number of leniency applications in Asia-Pacific in 2020 was 11, representing a decrease of 52% with respect to 2019, when the average number was 23. As it can be seen in Figure 2.10, the trend of leniency applications in the region is comparable to the one seen for the OECD jurisdictions.

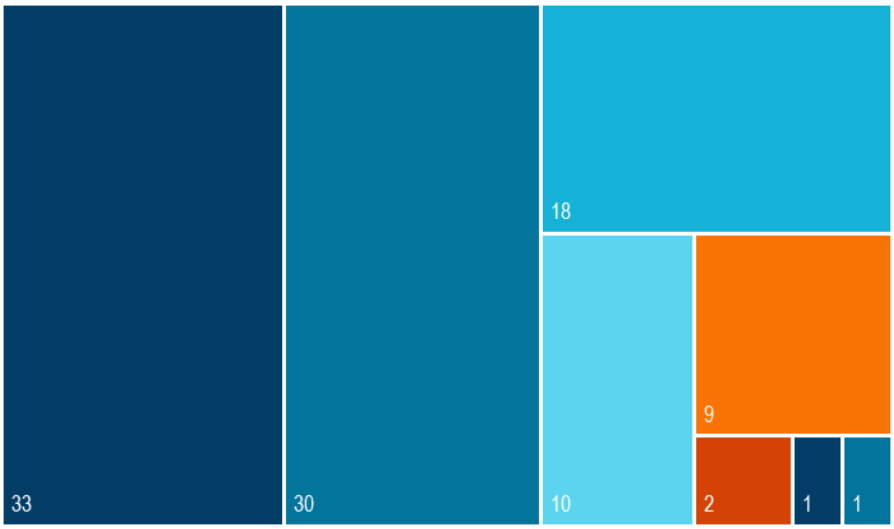
Figure 2.10. Average number of leniency applications in Asia-Pacific and OECD, per jurisdiction, 2015-2020



Note: Data from the jurisdictions in OECD CompStats database in the Asia-Pacific region for which comparable data are available for all years. The average for Asia-Pacific includes 9 jurisdictions, the average for OECD includes 29 jurisdictions.
Source: OECD CompStats Database.

However, while the majority of the jurisdictions in Asia-Pacific have a leniency programme, not all competition authorities are receiving leniency applications. In 2020, only 8 out of the 12 jurisdictions with a leniency programme had received at least one application. Moreover, the two jurisdictions with the highest number of applications accounted for 60% of the total applications in the region, and the largest three accounted for 78% (Figure 2.11).

Figure 2.11. Total number of leniency applications in Asia-Pacific per jurisdiction, 2020

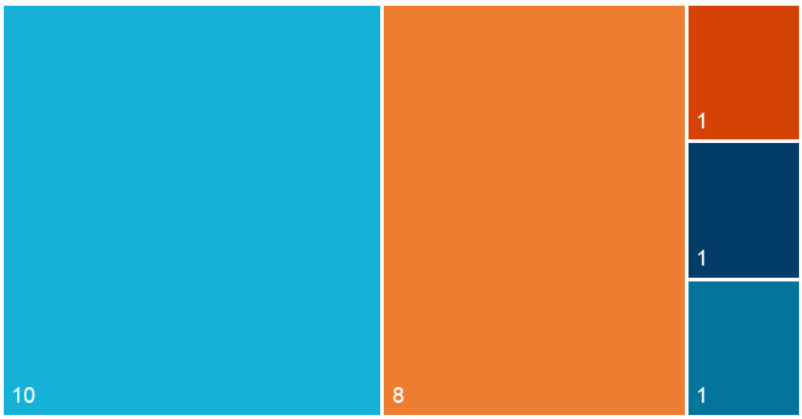


Note: Data from the 12 jurisdictions in OECD CompStats database in the Asia-Pacific region for which comparable data are available for 2020.
Source: OECD CompStats Database.

Unilateral conduct

Regarding unilateral conduct[31], enforcement is very limited in the region and concentrated in a small number of jurisdictions. 9 out of the 16 jurisdictions have made at least one abuse of dominance decision in the period 2015 to 2020. In 2020, only five out of a sample of 14 jurisdictions that reported the information, had at least one abuse of dominance decision and 7 jurisdictions reported having opened at least one ex-officio abuse of dominance investigation (Figure 2.12). However, it is expected that enforcement of unilateral conducts increases in the region in the upcoming years.

Figure 2.12. Total number of abuse of dominance decisions in Asia-Pacific, 2020



Note: Data from the 14 jurisdictions in OECD CompStats database in the Asia-Pacific region for which comparable data are available for 2020.
Source: OECD CompStats Database.

[31] It is important to highlight that even though authorities in the region, and around the world, agree about the need of prohibiting certain unilateral anti-competitive conduct, they use slightly different concepts and language. Europe and a number of other jurisdictions around the world, including most jurisdictions in ASEAN, refer to 'abuse of dominance'. Some other jurisdictions in Asia-Pacific use 'unlawful or attempted monopolisation', while Australia's refers to 'misuse of substantial market power' (OECD, 2018[20]).

Box 2.2. Abuse of dominance investigations in Asia-Pacific

The year 2021 has been a year with a relatively high number of abuse of dominance decisions in Asia-Pacific, of which in many of them, economic analysis has played an important part.

For instance, in April 2021, the State Administrator for Market Regulation (SAMR) from the People's Republic of China imposed a record fine of RMB 18.228 billion (approximately EUR 2.3 billion) on Alibaba for abusing its dominant position on the e-commerce platform services market[1], particularly for establishing exclusivities with the retailers selling on the platform. SAMR concluded that Alibaba had a dominant position in the market due to its high market shares (exceeding 50%) between 2015 and 2019, high switching costs, including a high degree of market recognition and loyalty from consumers, strong financial and technical resources in logistics, payments and cloud computing, and network effects. SAMR also established that Alibaba abused its dominant position by using a combination of rewards and punishments to force or induce the retailers to market their products exclusively on Alibaba's platforms.

The SAMR concluded that the implementation of exclusivities reduced both inter-brand and intra-brand competition and affected consumers' welfare by reducing their choice. Moreover, the authority found negative effects on the allocation of resources and innovation rates. Besides a fine, the SAMR instructed the company in an administrative guidance letter[2] to eliminate the exclusivities, set up a robust anti-monopoly compliance programme and to notify all concentrations (even if they don't meet the merger notifications thresholds). Finally, Alibaba was instructed to improve the complaints handling mechanism and report on the implementation of these measures to SAMR on an annual basis for the next three years.

The Korea Fair Trade Commission (KFTC) fined Alphabet Inc. (Google) for abusing its dominant position in the market for mobile operating systems. It blocked customised versions of its operating system (Android) by making the devices' producers abide by an "anti-fragmentation agreement" when signing contracts regarding app store licences[5]. This meant that smartphone developers were restricted from installing or developing modified versions of Android.

KFTC found that failed attempts of competitors to develop variations of the operating system (including cases such as Amazon's Fire OS and smart TV, Alibaba's Aliyun OS, LG Electronics LTE smart speakers and Samsung Electronics Galaxy Gear 1) provided strong evidence for exclusionary effects resulting from Google's conduct. Moreover, the KFTC supported its decision with economic analysis. According to the KFTC, its conduct allowed Google to strengthen its monopolistic position, increasing its market share to 97% in 2020, from 38% 10 years ago.

Notes:

[1] SAMR Press release available at: http://www.samr.gov.cn/fldj/tzgg/xzcf/202104/t20210409_327698.html
[2] Administrative Guidance Letter of SAMR to Alibaba. Available at: http://www.samr.gov.cn/fldj/tzgg/xzcf/202104/P020210410314261976551.doc
[3] KPPU Press release. Available at: https://eng.kppu.go.id/icc-imposes-a-idr22-billion-fine-on-pt-conch-south-kalimantan-cement/
[4] KPPU Press release. Available at: https://eng.kppu.go.id/commercial-court-confirms-decision-of-icc-on-pt-conch-south-kalimantan-cement/
[5] KFTC Press release. Available at: https://www.ftc.go.kr/solution/skin/doc.html?fn=f0d92a276eb35238b62e3bdb0ccc17d7a11e538a2d7a6855435ab70ab2b7dc89&rs=/fileupload/data/result/BBSMSTR_000000002402/

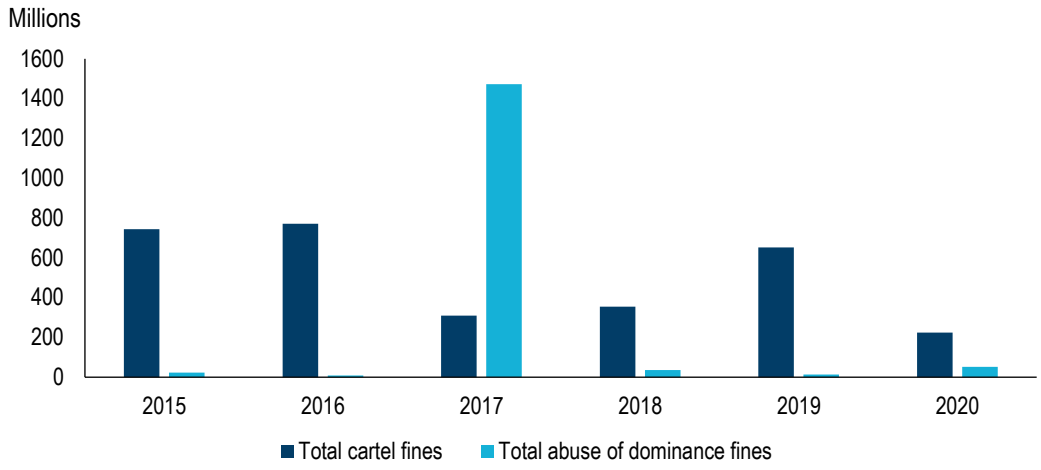
Sanctions

Fines, in all forms (administrative, civil or criminal) are one of the main sanctions used by the competition authorities to deter firms from violating substantive and/or procedural law. Fines are often imposed in complement to other forms of sanctions such as interim measures, remedies and imprisonment in some serious cases.

Even though the Asia-Pacific jurisdictions are still developing their enforcement capacity, an important amount of fines was imposed over the last six years 2015-2020 in the region, being mainly driven by a few jurisdictions responsible for imposing the largest amount of fines.

Cartel cases have long attracted the highest amount of fines in Asia-Pacific, with a wide variation in the amount of fines imposed in each case; being set in relation to the cartel participants' turnover related to the conduct as a main reason, among other factors. Cartel fines constitute around 90 to 95% of the total fines imposed (depending on the year), except for the year 2017, which saw a large spike in abuse of dominance fines. This was mainly driven by one landmark abuse of dominance case in the region.

Figure 2.13. Total amount of cartel and abuse of dominance fines in Asia-Pacific, 2015-2020



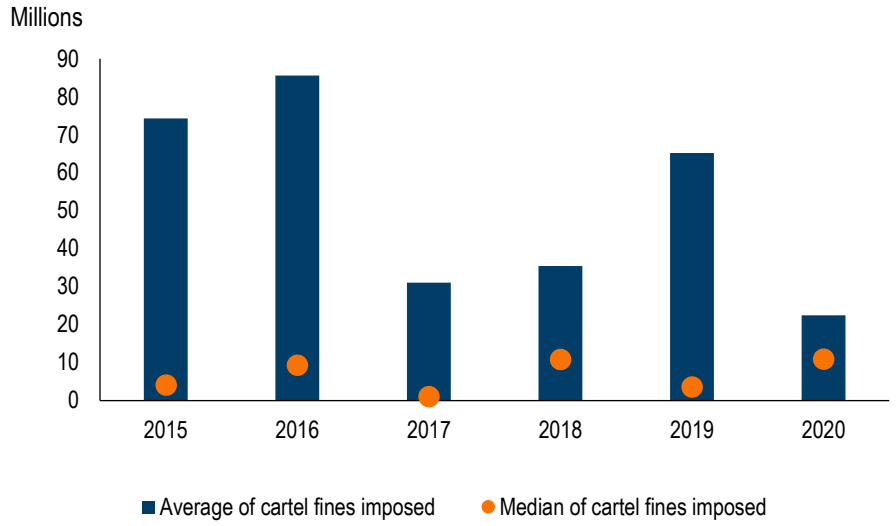
Note: Data from the 10 jurisdictions in OECD CompStats database in the Asia-Pacific region for which comparable data are available for all years. Fines figures are in 2015 EUR (non-euro currencies are converted using 2015 official exchange rates on 31 December 2015) to eliminate currency fluctuations distorting fines changes.
Source: OECD CompStats Database

Cartel fines had a decreasing trend over the period 2015-2020 with a compound annual growth rate of -18% in 2020 compared to 2015, equivalent to an average annual growth rate of -5% in the same period, with a large spike in 2016. One jurisdiction is mainly responsible for the great peak in cartel fines in 2016, by imposing 77% of the total cartel fines imposed in that year.

Moreover, Asia-Pacific witnessed a significant increase in the amount of cartel fines imposed in 2019, after two years of lower fine levels. On average, EUR 65.2 million were imposed with an increase of 84% compared to 2018, mainly driven by one other jurisdiction, responsible for almost 81.3% of this total increase.

As previously mentioned, the amount of cartel fines is highly concentrated in a few jurisdictions. A great difference between the median and average values is shown in Figure 2.14. For example, while on average EUR 65.2 million was imposed in 2019 being driven by one jurisdiction, a median of only EUR 3.2 million was imposed in the region.

Figure 2.14. Average and median amount of cartel fines in Asia-Pacific per jurisdiction, 2015 - 2020



Note: Data from the 10 jurisdictions in OECD CompStats database in the Asia-Pacific region for which comparable data are available for all years. Fines figures are in 2015 EUR (non-euro currencies are converted using 2015 official exchange rates on 31 December 2015) to eliminate currency fluctuations distorting fines changes.
Source: OECD CompStats Database

Even though the amount of abuse of dominance fines is lower than the cartel fines imposed in the region, the abuse of dominance fines show an increasing trend over the period 2015-2020. The abuse of dominance fines had a compound annual growth rate of 15% higher in 2020 (relative to 2015), significantly affected by the huge spike in 2017.

Over EUR 1 400 billion was imposed in 2017, highly affected by fines imposed in a landmark case in two jurisdictions in the region. These two jurisdictions were responsible for around 99% of the total abuse of dominance fines imposed in that year, highly driven by the amount of fines imposed in this specific case.

Similar to cartel fines, abuse of dominance fines is highly concentrated in a few jurisdictions responsible for imposing most fines in each year, affecting the average amount of abuse of dominance fines imposed.

The role for international co-operation in the rapid growth in competition activity

The presence of best practices and vast experience of OECD members in the region benefits the younger agencies authorities, as the mature and experienced agencies authorities share their experience and transfer much of their knowledge. The OECD/KPC plays a pivotal role in this exchange of knowledge and experience. Its Competition Programme works with 26 competition authorities in the Asia-Pacific region to support the development and implementation of effective competition law and policy. The OECD/KPC organises and facilitates workshops, seminars and other events that allow the authorities in the region to discuss common challenges and learn from each other's experiences to develop their capacity in competition enforcement.

Besides the work of the OECD/KPC, the OECD peer reviews and country reports are also an important instrument in Asia-Pacific to help jurisdictions design or change their competition law systems (Kovacic and Lopez-Galdos, 2016[5]). The OECD has conducted reviews of national competition laws and policies in the People's Republic of China (OECD, 2009[6]), Japan [(OECD, 1998[7]), (OECD, 1999[8]) and (OECD, 2004[9]), Korea [(OECD, 2000[10]), (OECD, 2000[11]) and (OECD, 2004[12]), Chinese Taipei (OECD, 2006[13]) and Viet Nam (OECD, 2018[2]).

Box 2.3. Fostering Competition in ASEAN

Advocating for Competition

Competition has become a focus area for policy makers in Southeast Asia since the ASEAN Economic Community Blueprint 2015 (AEC Blueprint 2015) identified clear initiatives with deadlines regarding the implementation of competition law and policy in the region. The ASEAN Competition Action Plan (ACAP) 2016 2025 built on the AEC Blueprint 2015 and the succeeding AEC Blueprint 2025, by establishing five strategic goals in ASEAN to work towards effective and enforceable competition policies and laws1. Notably, the first goal establishes that effective competition regimes should be established in all ASEAN Member States (AMS). With Cambodia adopting its competition law in October 2021, all AMS have now adopted a legal framework on competition law and policy, effectively achieving the first goal of the ACAP 2016-2025.

The OECD has provided significant support in the past years to foster competition in ASEAN by focusing on two other initiatives in the ACAP 2016-2025 in a project that was undertaken between 2018-21.2 These initiatives related to the commitment of AMS to implement significant reforms towards market liberalisation and elimination of competition distortions.

For this project, the ASEAN Secretariat and ASEAN Expert Group on Competition (AEGC) had selected the logistics sector as the industry of focus, as it can play a significant role in increasing ASEAN's economic development, and is included in the AEC Blueprint's 12 priority integration sectors. Indeed, efficient logistics can play a significant role in increasing a country's economic development by facilitating international trade and improving its competitiveness. By developing an efficient logistics system, a country can enhance its connectivity to better serve its importers and exporters, and satisfy the needs of regionally integrated production facilities for reliable just-in-time delivery of inputs and outputs.

Against this background, the ASEAN Secretariat, with funding from the UK Foreign, Commonwealth & Development Office (UK Government), tasked the OECD to assist with the implementation of Initiatives 4.1 and 4.2 of the ACAP 2016-2025. These two initiatives require an assessment of the impact of competition law and policy on the markets of all 10 ASEAN member states, both in general (4.1) and with a focus on state-owned enterprises (4.2).

In the course of its research, the OECD team analysed more than 700 pieces of legislation and cooperated with more than 280 ASEAN public and private stakeholders in the region. The two regional reports, along with the 20 country reports for the AMS, propose hundreds of recommendations to remove obstacles to competition in the logistics business, level the industry playing field to drive growth and employment, and expedite ASEAN's exit from the economic hardship brought upon it by the COVID crisis.

In a landmark event on 9 September 2021, OECD Secretary-General Mathias Cormann, ASEAN Secretary General Dato Lim Jock Hoi, the ASEAN Economic Ministers, and UK Minister for Trade Policy, Greg Hands jointly launched the two regional reports (the OECD Competition Assessment Reviews: Logistics Sector in ASEAN and the OECD Competitive Neutrality Reviews: Small-Package Delivery Services in ASEAN) at the 53rd ASEAN Economic Ministers Meeting.

Note: An ASEAN Competition Action Plan 2016-2025 (https://www.asean-competition.org/about-aegc-asean-competition-action-plan-acap-2016-2025). In July 2021, the ASEAN Member States published a review of the ACAP 2016-2025 and introduced four new deliverables. Fostering Competition in ASEAN - OECD.

Conclusion

In conclusion, competition efforts in much of Asia-Pacific have been focused on advocacy, mainly through market studies to understand their dynamics. In many young jurisdictions in the region priorities lie in creating a culture of competition and adjusting to new competences and functions. Enforcement in the region is therefore often still limited, particularly regarding unilateral conduct. It is worth mentioning that there is a high concentration of enforcement activity in the region, with few jurisdictions (mostly with well-established authorities) reporting high numbers of decisions, fines and leniency applications, while others still present low numbers. Finally, the data shows that jurisdictions in Asia-Pacific have significantly increased their resources through increases in budget and staff.

3 Merger control in Asia-Pacific

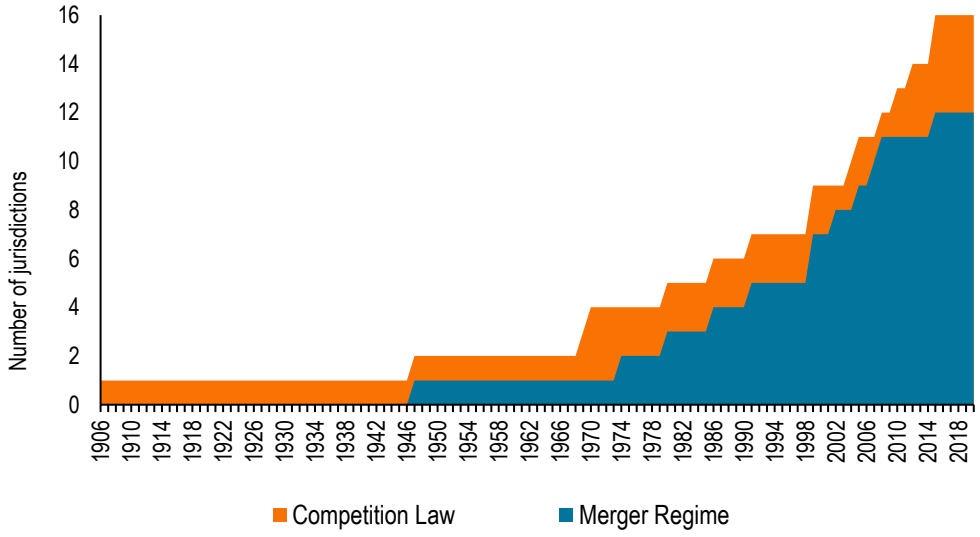
Merger regimes in the region

As of 2019, 135 jurisdictions around the world have merger laws or regulations in place (OECD, 2021[14]). This number is a result of a significant increase in recent decades, and Asia-Pacific jurisdictions are no exception in this regard. To the contrary, the region has demonstrated a significant increase in the number of new merger control regimes, and besides has seen several regimes implementing significant amendments to their already active merger regime.

Since 2000, at least six jurisdictions in Asia-Pacific introduced merger control: [India (2002), Viet Nam (2005), Singapore (2007), People's Republic of China (2008), Brunei Darussalam and the Philippines (2015)]. These additions join established authorities in the region that had merger control regimes for over 50 years such as Japan, Australia, Korea, and New Zealand.

Out of the 16 jurisdictions covered by the CompStats database, two jurisdictions in Asia-Pacific do not include a general review of mergers in their competition laws: Hong Kong, China[32] and Malaysia[33] (OECD, 2018[15]). Moreover, merger control in Bangladesh and Brunei Darussalam[34] is not in force yet.

Figure 3.1. Development of competition law and merger regimes in force in Asia-Pacific



Note: Data from the 12 jurisdictions in the OECD CompStats database in the Asia-Pacific region with a merger control regime in place.
Source: OECD analysis based on publicly available information.

[32] Hong Kong, China has merger control that applies for the telecommunications sector only.

[33] Malaysia has merger control that applies for the telecommunications and the aviation sectors only.

[34] Brunei Darussalam Competition Order 2015 is planned to be in force in phases, starting with the prohibition of Anti-Competitive Agreements at the beginning of 2020. Available at: http://ccbd.gov.bn/SitePages/competition-order-2015.aspx

Merger notification approaches

The legal design of merger control and the implementation of its provisions can differ substantially from one jurisdiction to another. This is indeed the case in the Asia-Pacific region, where for instance regimes vary between mandatory merger filing – either before or after the closing of a transaction – and a voluntary filing of mergers.

As described above, out of the 16 jurisdictions in our sample, 12 have an active merger regime. Therefore, the following graphs will focus on these 12 jurisdictions, or those that provided data for all years.[35] One of the key elements of any merger control is the filing deadline. As can be seen in Figure 3.2, most of our sample, nine jurisdictions, require a mandatory notification for transactions meeting the set thresholds. In six of those jurisdictions, merging parties are meant to do so before closing the transaction, in two jurisdictions notification can be done either before or after closing, and one has a mandatory ex-post notification system only. Three jurisdictions allow merging parties to voluntarily notify their transaction pre-merger for review.

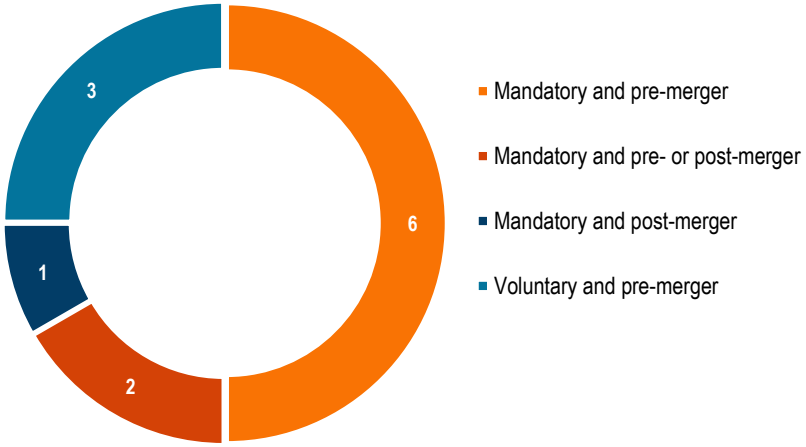
In recent years, a handful number of jurisdictions have amended their merger provisions concerning the notification and filing process for the parties. For example, in July 2017, India's merger control was amended, for a period of five years, to allow the parties to notify their merger any time before consummation, instead of the previous deadline of notification within 30 calendar days of the execution of the transaction[36]. Moreover, the Philippines has recently chosen a similar path with the COVID-19 pandemic, to any time before consummating the agreement, instead of having a deadline of 30 days from the signature of definitive agreements.

The Japanese Federal Trade Commission (JFTC) amended its merger guidelines and policies in 2019 to include different scenarios and situations that can lead to reviewing non-notifiable cases that fall below the set thresholds but may be of competitive concern, and therefore, has conducted a handful of merger reviews. Amendments to the merger guidelines include*, inter alia*, exceptional situations where the JFTC conducts substantial review even when a transaction meets the safe harbour criteria, cases where the business base or research and development base of the acquired company is in Japan (see (Japan Federal Trade Commission, 2019[16]) and (White & Case LLP, 2021[17])).

[35] For 2015-2020 graphs, nine jurisdictions are included, as they have provided data for all six years. For the 2020 graphs, all the 12 jurisdictions are included as all 12 jurisdictions provided data for 2020.

[36] Notification S.O. 2039 (E), June 9th, 2017 regarding exemption from notifying a combination within thirty days mentioned in Section 6(2) of the Competition Act, 2002.

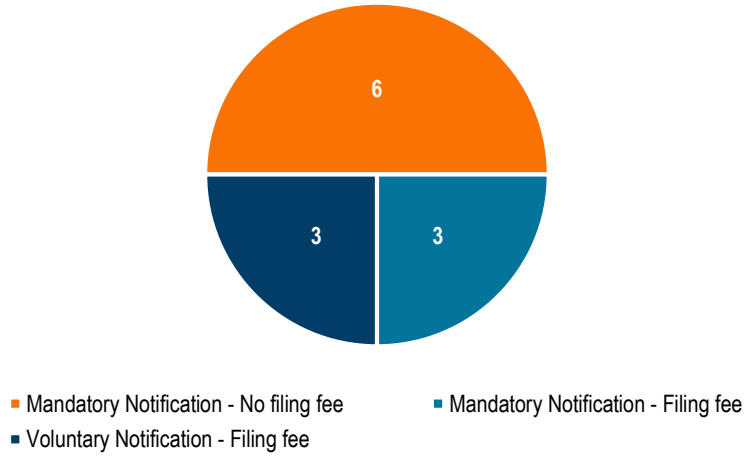
Figure 3.2. Overview of mandatory and voluntary merger-notification regimes in Asia-Pacific, 2020



Note: Based on data from the 12 jurisdictions in the OECD CompStats database with a general merger control regime in place. Some jurisdictions might have more than one criterion to evaluate transactions.
Source: OECD analysis based on publicly available information.

Six of the twelve jurisdictions with an active general merger control have filing fee requirements, while six others do not. For the six that have filing fees, they differ substantially, regardless of whether the notification of an intended or consummated transaction is mandatory or voluntary. While in three jurisdictions that have a voluntary merger notification system, the authorities charge a fee for the merger filing, six mandatory notification systems do not require a filing fee.

Figure 3.3. Filing-fee requirements for merger review in Asia-Pacific, 2020



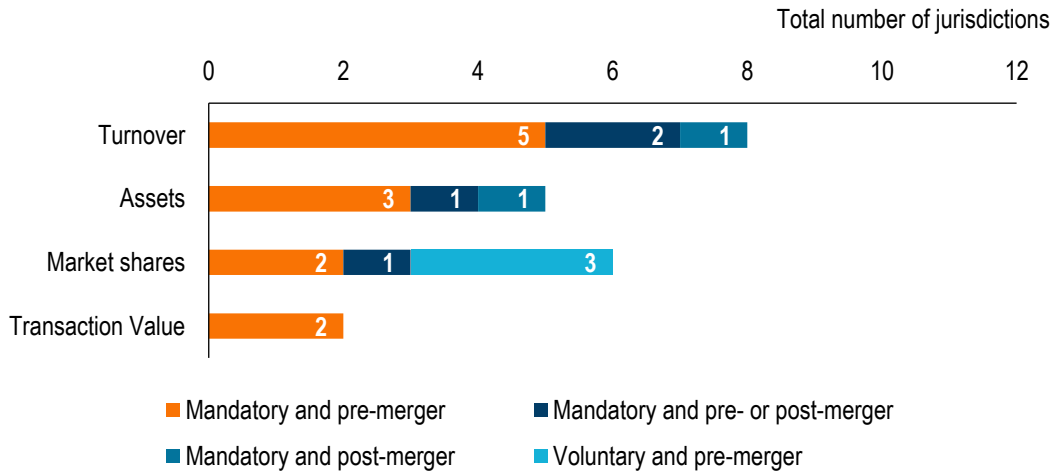
Note: Based on data from the 12 jurisdictions in the OECD CompStats database with a merger control regime in force.
Source: OECD analysis based on publicly available information.

The level of the thresholds criteria significantly varies in Asia-Pacific. Jurisdictions have adopted different nominal values for turnover criteria, which is the most common one used to establish merger notifications in the region. When comparing them using their level of economic activity, the percentage of turnover thresholds with respect to the GDP ranges between 0.001% and 0.016% of GDP.

As illustrated in Figure 3.4, most jurisdictions rely on turnover thresholds to determine notifiable mergers. The turnover threshold creates the obligation to notify a merger in eight out of nine jurisdictions that have a mandatory notification system, often combined with other criteria such as the total assets involved, market shares, and transaction value.

Market shares, in particular the post-transaction market shares, are the main determinant for a merger notification in the three voluntary merger regimes[37].

Figure 3.4. Selected criteria for establishing merger notifications thresholds in Asia-Pacific, 2020



Note: Based on data from the 12 jurisdictions in the OECD CompStats database with a merger control regime in place. Some jurisdictions might have more than one criterion to evaluate transactions.
Source: OECD analysis based on publicly available information.

Merger Procedures

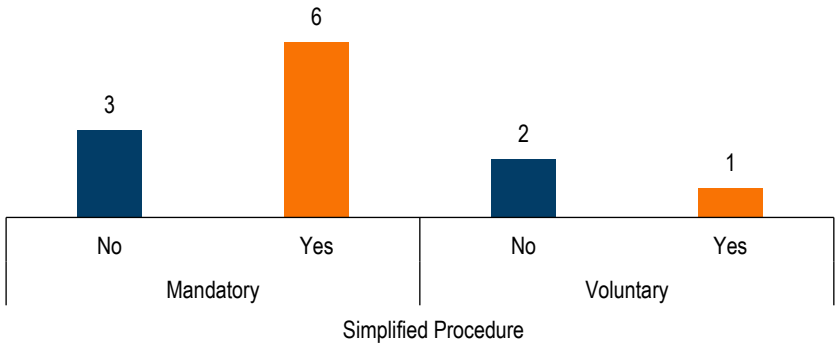
The review timeline is one of the fundamental aspects of merger control. The time in which the merger is reviewed by the competition authority can affect the legal costs involved to close a transaction and affect legal certainty.

With the intent to minimise the legal costs for the merging parties and the required time and resources for the authorities, some jurisdictions have adopted a simplified notification process and simplified assessment for the transactions that meet certain criteria and ultimately do not cause competitive harm. This was the case for 7 out of the 12 jurisdictions analysed, 6 of whom have a mandatory notification regime.

With regard to the COVID-19 pandemic, some jurisdictions implemented adjustments with regards to the merger notification. The Philippines was one of them, adopting a simplified procedure for non-problematic transactions.

[37] The OECD Recommendation on merger review (OECD, 2005[47]) and the ICN Recommended Practices (International Competition Network, 2008[46]) set out that notification thresholds should be based on objective criteria and based on information that is readily available to the merging parties.

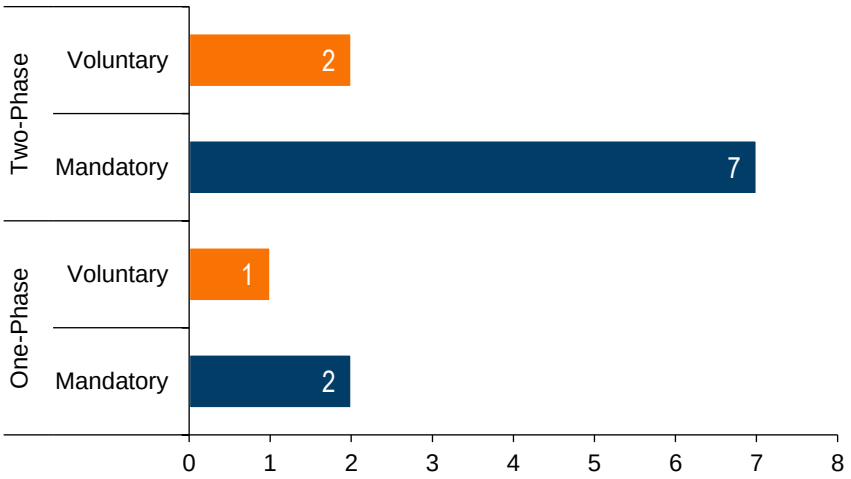
Figure 3.5. Use of simplified merger regimes in Asia-Pacific, 2020



Note: Based on data from the 12 jurisdictions in the OECD CompStats database with a merger control regime in place.
Source: OECD analysis based on publicly available information.

Most regimes with mandatory merger notification make a distinction between an initial and an in-depth review (or phase two), allowing faster clearance (during the first phase) for mergers that do not raise competition concerns. Only three jurisdictions adopt a one-phase approach. Both these approaches are used in voluntary and mandatory notification approaches.

Figure 3.6. Jurisdictions in Asia-Pacific with one-phase or two-phase approaches, 2020



Note: Based on data from the 12 jurisdictions in the OECD CompStats database with a merger control regime in place.
Source: OECD analysis based on publicly available information.

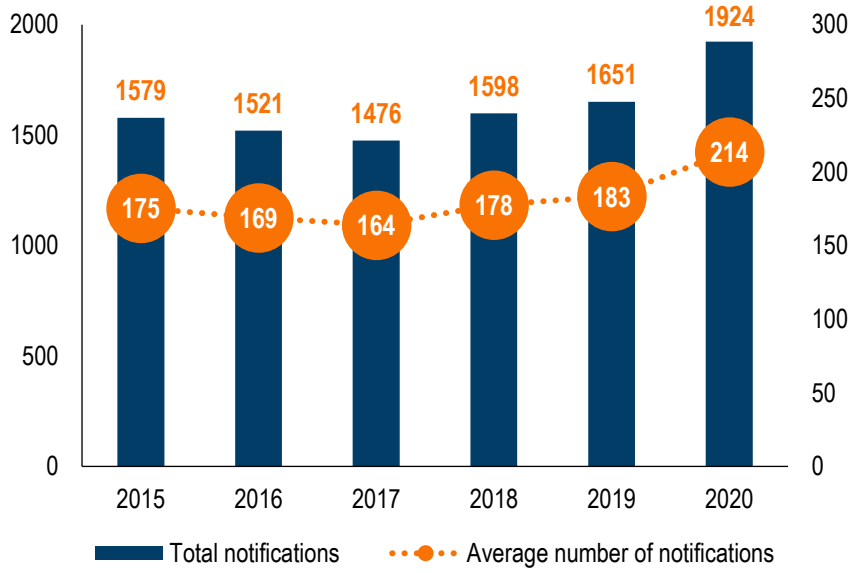
Merger activity

Increase in the number of notifications

Notwithstanding the COVID-19 pandemic, the region has witnessed a significant increase in the notified and reviewed mergers in 2020. While both the average number of notifications per jurisdiction and the total number of notifications in the region increased in the past six years, the largest growth was seen in 2020.

In 2020, 2 436 mergers were notified in the region, representing an average of 203 notifications per jurisdiction in that year[38]. Between 2015 and 2020, the number of notifications increased by almost 22% with an average annual growth rate of 4%, while the growth rate in 2020 was almost 17% (see Figure 3.7)[39].

Figure 3.7. Total (left) and average (right) number of merger notifications in Asia-Pacific, 2015-2020



Note: Data from the 9 jurisdictions in Asia-Pacific with a merger regime included in the OECD CompStats database for which comparable data are available for all years.
Source: OECD CompStats database.

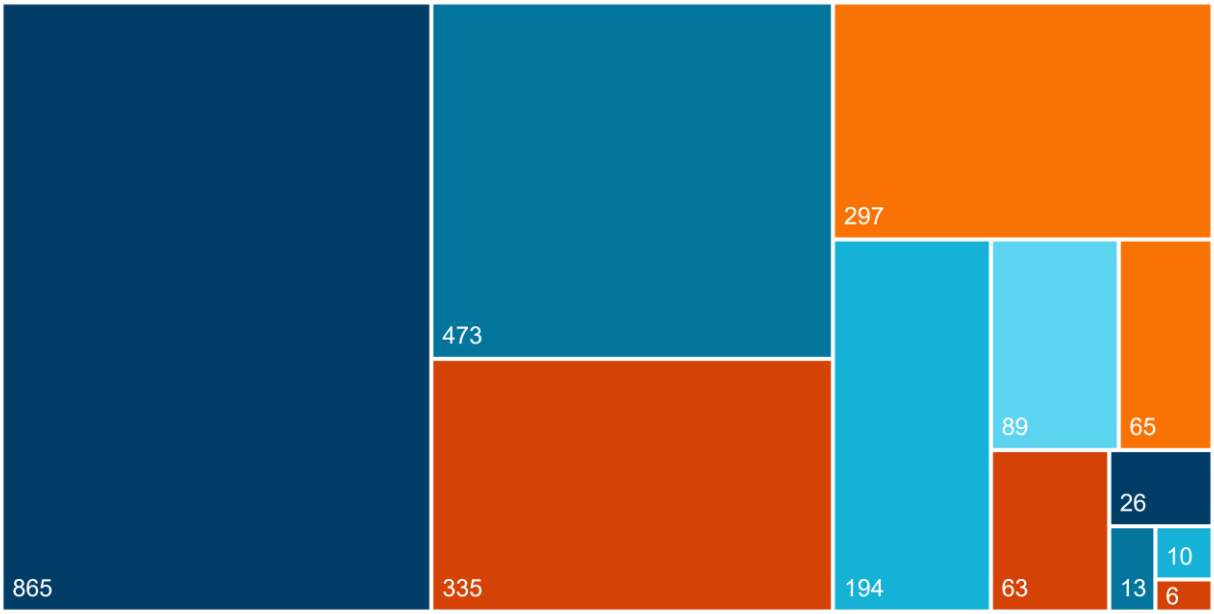
This growth was strongly driven by a selected number of jurisdictions. In 2020, 1 924 mergers were filled in nine jurisdictions in the region[40], with an average of 214 per jurisdiction. However, 865 of those were filled in a single jurisdiction, accounting for almost 45%, while 4 out of 12 jurisdictions (one-third of the jurisdictions) were responsible for 68% of the merger notifications. The remaining seven jurisdictions were responsible for only 14% of the total notifications (see also Figure 3.8).

[38] These numbers include the 12 jurisdictions in Asia-Pacific with a merger regime included in the OECD CompStats database for which comparable data are available for 2020.

[39] This increase in the number of notifications in 2020 is mostly driven by two jurisdictions that recently amended their merger provisions, increasing the scope of action of their merger control.

[40] These numbers include the nine jurisdictions that have a merger regime and provided data for the six years.

Figure 3.8. Total merger notifications in Asia-Pacific, by jurisdiction, 2020



Note: Data from the 12 jurisdictions with a merger regime included in the OECD CompStats database for which comparable data are available for 2020
Source: OECD CompStats Database.

The dynamics described above can be partly explained by changes in the jurisdictions' merger regimes that have been introduced in the period 2015-2020.

Indonesia also introduced changes in its legislation in 2019, by enacting the Regulation No. 3 of 2019, expanding the scope of its merger control rules. These changes introduced, inter alia, many amendments regarding (i) the 'single nexus' criterion and foreign-to-foreign transactions[41], (ii) the introduction of the acquisition of both tangible and intangible assets as a notification requirement. These amendments resulted in a significant increase in the number of notifications in Indonesia at the end of 2019 and 2020[42].

Viet Nam also witnessed a key change in 2018 with the promulgation of its new Competition Law. This new law took effect on 1 July 2019 and brought merger control closer to more established merger regimes in Asia-Pacific and the world (Nguyen Anh Tuan, 2021[18]). Moreover, the government issued Decree 35/2020/ND-CP (Decree 35), implementing its new Competition Law, and took effect on 15 May 2020. Under the new merger control regime, the expansion of the notification criteria, the relatively low market share threshold and the inclusion of the foreign-to-foreign transaction that have local subsidiaries or generate sales in or into Viet Nam in the application of their merger rules have significantly increased the number of notifications received by the VCCA in 2020.

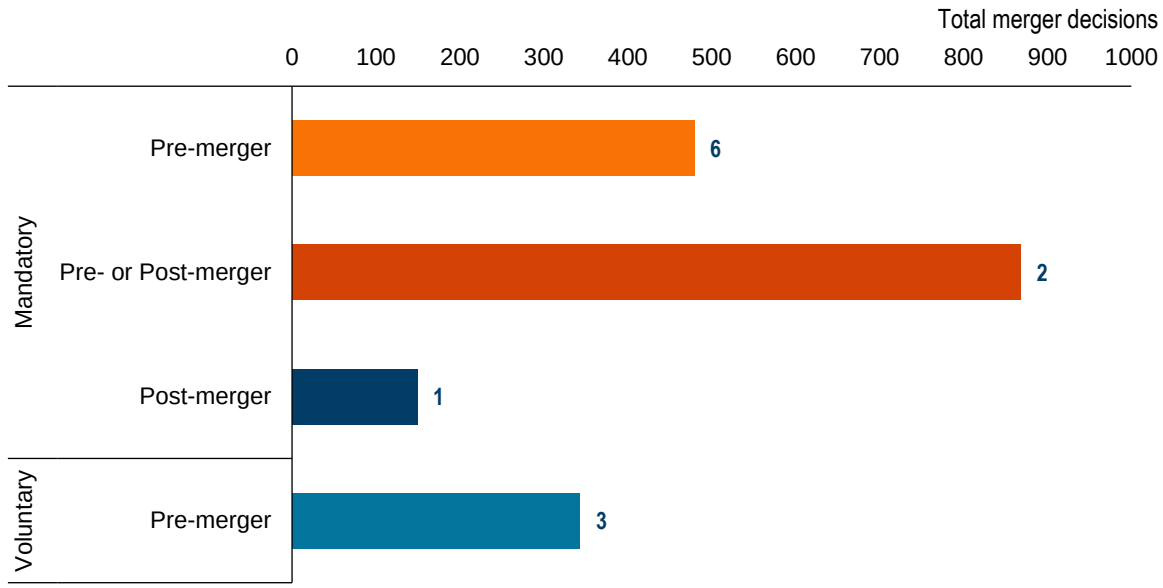
[41] Article 23 of the Regulation of the Commission for the Supervision of Business Competition of the Republic of Indonesia number 3 year 2019: "*Transactions of mergers, consolidations, or acquisitions of company shares and/or assets meeting the limit of value of notification and taking place in the territory of the republic of Indonesia must be notified to the commission, if all the parties or one of the parties conducting such mergers, consolidations, or acquisitions of company shares and/or assets conduct(s) business activities or sales in the territory of the Republic of Indonesia*". Available at: https://eng.kppu.go.id/wp-content/uploads/ICC_s-Merger-Regulation.pdf

[42] The Regulation of the Commission for the Supervision of Business Competition of the Republic of Indonesia number 3 year 2019, available at https://eng.kppu.go.id/wp-content/uploads/ICC_s-Merger-Regulation.pdf

Particularly, for 2020, merger review could have been partly affected by the COVID-19 pandemic. To provide ease to the review process to the notifying parties, many jurisdictions temporarily relaxed some of their procedural rules, including extended time for filing the transaction, changes in thresholds, among others, as could be seen in more detail Box 5.2. These adjustments helped the parties to consummate their transactions throughout the pandemic period, without significant delays and no negative impact on the number of notifications nor the number of mergers reviewed in 2020.

As was the case for merger notifications, in 2020, a small number of authorities were responsible for a large number of decisions. More specifically, two jurisdictions were responsible for almost 48% of all decisions.

Figure 3.9. Total merger decisions in Asia-Pacific by type of merger regime, 2020



Note: Data from the 12 jurisdictions with a merger regime included in the OECD CompStats database for which comparable data are available for 2020. Numbers indicated on the graph represent the number of jurisdictions
Source: OECD CompStats Database.

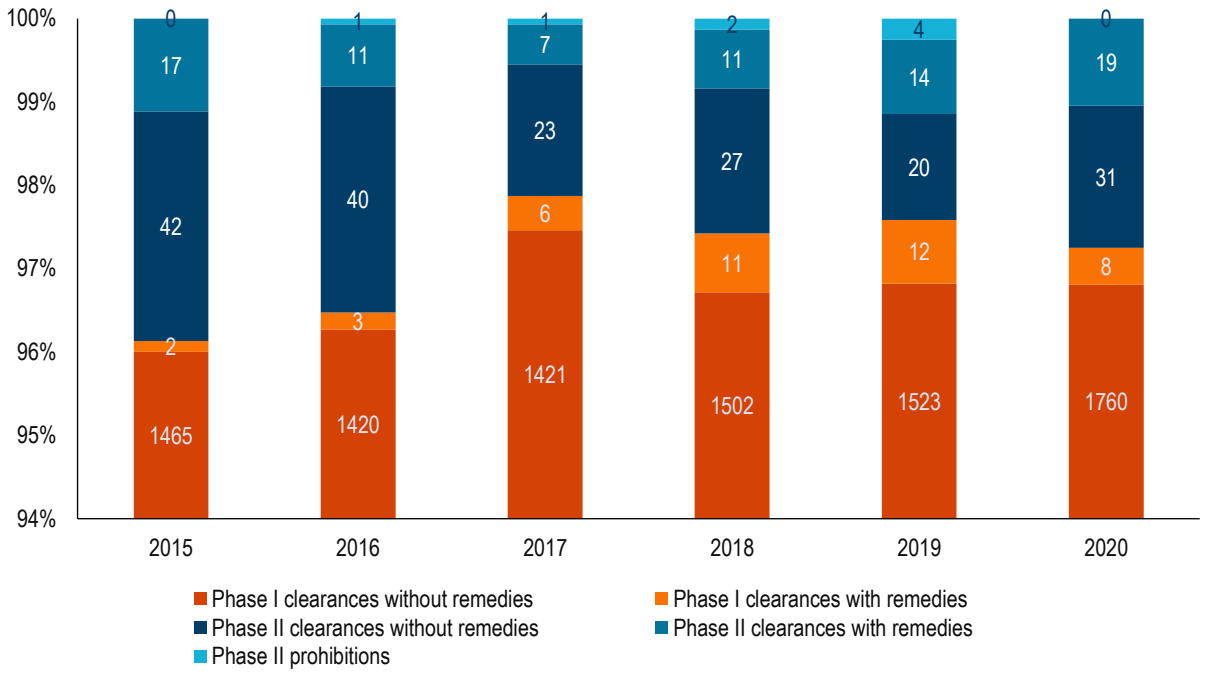
Increase in the number of phase II reviews

Most of the mergers reviewed in Asia-Pacific were deemed not to have anti-competitive effects, as illustrated in the high percentage of transactions cleared without a remedy (see Figure 3.10). This high proportion remained relatively stable during the period 2015 to 2020 at around 96% to 97%. Only a low percentage of mergers required an in-depth phase-II investigation.

The material increase in phase II decisions might have resulted from the several law amendments that took place in several jurisdictions. One of those key changes in the region was the promulgation of the new Vietnamese merger control that introduced the effects-based approach that focuses on a more comprehensive assessment of potential merger effects, replacing the form-based approach, which limited the merger assessment to the post-merger combined market share[43]. This approach shift, among other factors, has been reflected in the increase of phase II decisions taken in 2020.

[43] Decree No. 35/2020/ND-CP of the Government of Viet Nam.

Figure 3.10. Types of merger decisions, 2015 – 2020

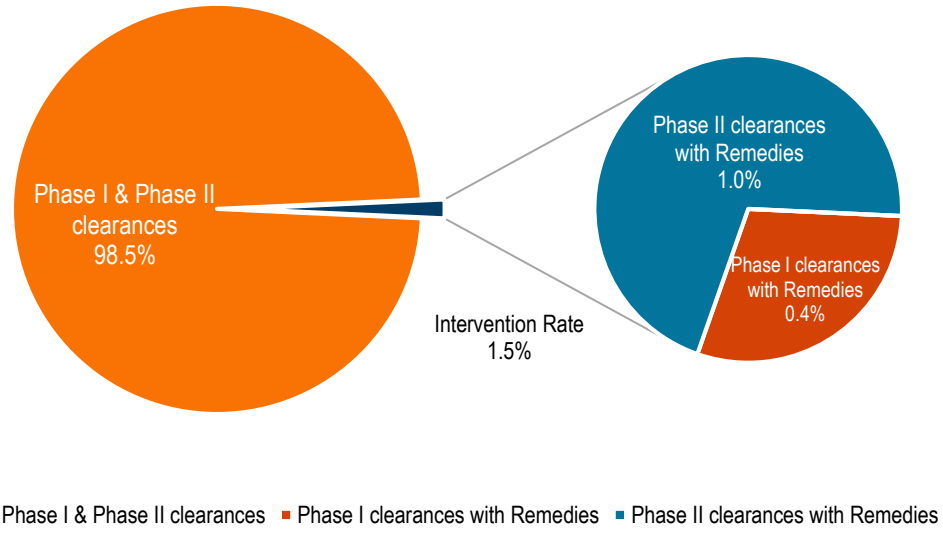


Note: Data from the 9 jurisdictions with a merger regime included in the OECD CompStats database for which comparable data are available for all years. Decisions include cases in which the waiting period had expired. The numbers indicated on the graph represent the absolute value of the total decisions in each sub-group.
Source: OECD CompStats database.

2020 followed a similar dynamic as the previous years in terms of the structure of the types of merger decisions in the region. Most, close to 98.5% of the mergers reviewed in 2020, were cleared in phase I and phase II without remedies, including the ones cleared in jurisdictions with a single-phase regime. This percentage is higher than the number of clearances in the world without remedies, which accounted for 93.3% in 2020. Moreover, the intervention rate, that is, the percentage of cases in which the competition authority has imposed remedies, prohibited a case or where the notification was withdrawn – was of 1.5% in 2020. This compares to an intervention rate of 2.2% for 2020 in the world. Of the remaining 1.5% mergers in Asia-Pacific, 1% of the notifications was cleared with remedies to address the competition concerns in phase I, while 0.4% was cleared with remedies in phase II. No merger was prohibited in the region in 2020.

The overall distribution of types of merger decisions in Asia-Pacific was relatively stable during the period 2015 to 2020, following the same trend as the rest of the world, although there was a particular material fall in the share of phase II mergers without remedies 2017 across nearly all jurisdictions in the region, that seemed to be compensated by Phase I mergers without remedies. The remaining types of merger decisions were particularly stable throughout the period.

Figure 3.11. Overview of types of merger decisions in Asia-Pacific, 2020

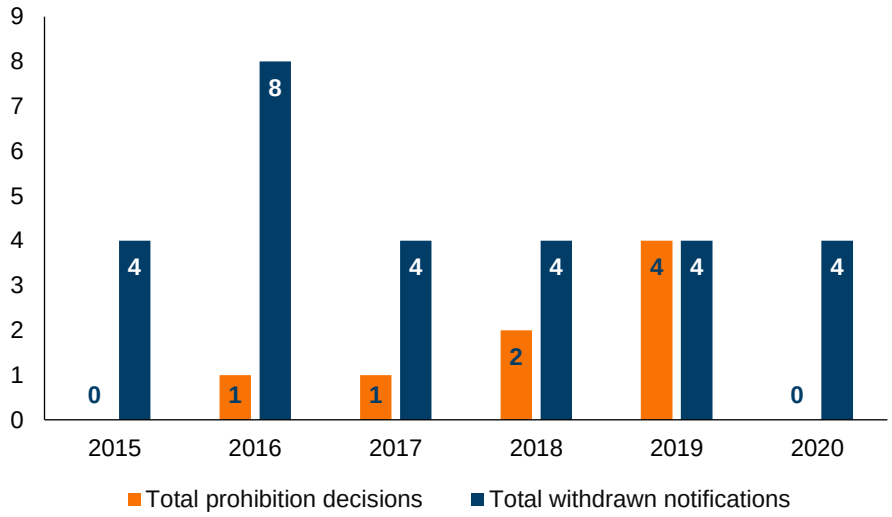


Note: Data from the 12 jurisdictions with a merger regime included in the OECD CompStats database for which comparable data are available for 2020. Phase I clearances, Phase I clearances with remedies, and Phase II prohibitions include single-phase decisions. Phase I and Phase II clearances include cases of expiration of waiting period. Intervention rate comprises the use of remedies and prohibitions (although there were prohibited mergers in 2020 in the region).
Source: OECD CompStats database.

Limited number of merger interventions

Blocking mergers or withdrawing notifications occurs rarely in Asia-Pacific. On average, only four mergers are withdrawn per year in the region, and one is blocked, with some years where the number of blocked mergers is zero while in 2019, 4 prohibition decisions were issued (Figure 3.12). Considering that the number of merger decisions is increasing per year, this means a decrease in the proportion of mergers blocked and withdrawn.

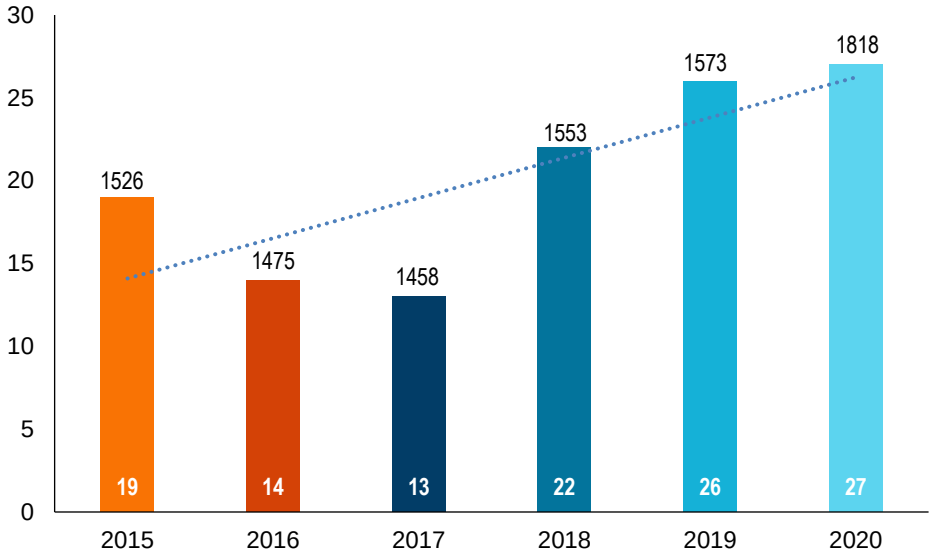
Figure 3.12. Total prohibition decisions and withdrawn notifications in Asia-Pacific, 2015-2020



Note: Data from the 9 jurisdictions with a merger regime included in the OECD CompStats database for which comparable data are available for all years.
Source: OECD CompStats database.

Remedies are used by the competition authorities around the world when a merger will likely result in substantial harm to competition, to resolve competition concerns and effectively maintain or restore competition on the market resulting directly from the merger transaction. In Asia-Pacific, the use of remedies in most jurisdictions is relatively low, although increasing over time. Since 2016, approximately 4-5% of mergers were cleared with remedies in either phase I or phase II. Yet, the absolute number of mergers with remedies over the total merger decisions had increased by more than 40% over the past six years, from 19 in 2015 to 27 decisions that were cleared with remedies in 2020. In relative values, the proportion of mergers cleared with remedies decreased in 2020 compared to 2019. As illustrated in Figure 3.13, the total number of decisions in the region significantly increased while the number of decisions cleared with remedies stayed almost stable (26 to 27 decisions), and therefore the proportion of use of remedies decreased by 9 percentage points.

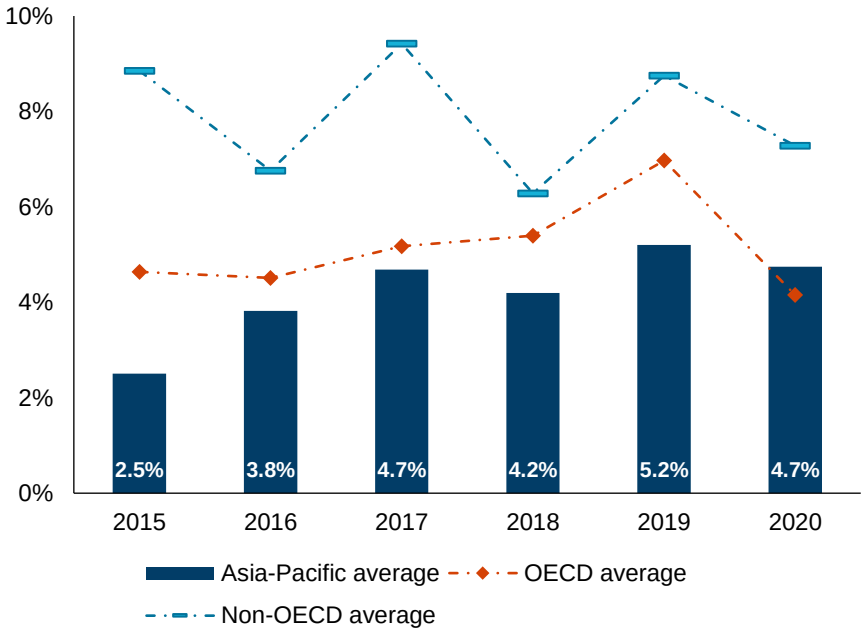
Figure 3.13. Total merger decisions cleared with remedies in Asia-Pacific, 2015-2020



Note: Data from the 9 jurisdictions with a merger regime included in the OECD CompStats database for which comparable data are available for all years. Numbers on top of the bars indicate total merger decisions per year in Asia-Pacific (Phase I and Phase II clearances including cases of expiration of waiting period, Phase I and Phase I clearances with remedies, and Phase II prohibitions include single-phase decisions).
Source: OECD CompStats database.

Figure 3.14 shows the proportion of use of remedies over total decisions in Asia-Pacific compared with the OECD and Non-OECD averages. In 2020, Asia-Pacific cleared 4.7% of the decisions conditioned to remedies, while on average 4.2% of the decisions were cleared with remedies in OECD jurisdictions and 7.3% in non-OECD jurisdictions.

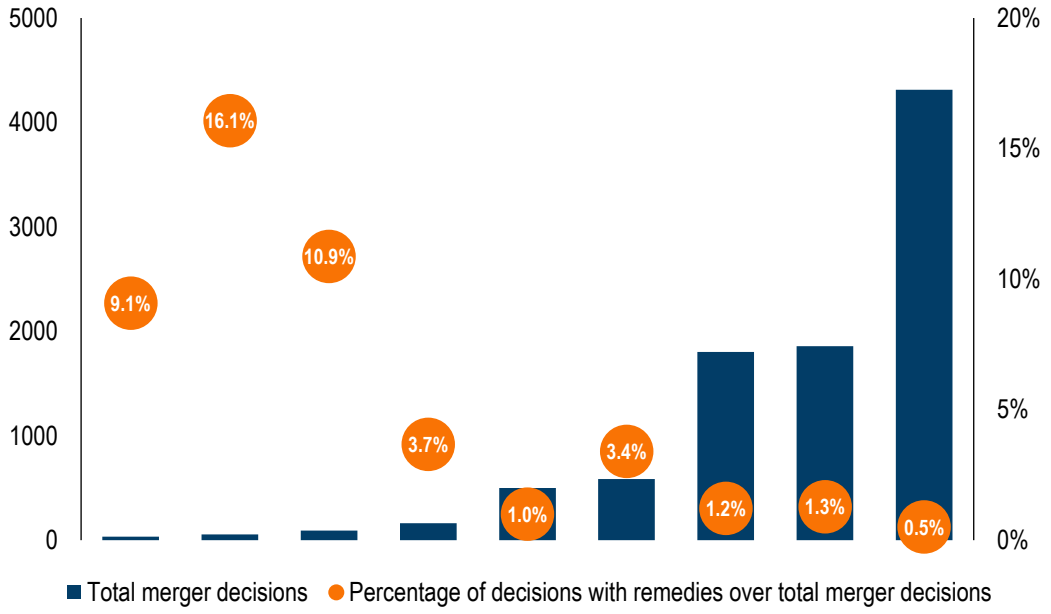
Figure 3.14. Proportion of use of remedies over total decisions in Asia-Pacific, OECD and Non-OECD Jurisdictions, 2015-2020



Note: Data from the 9 jurisdictions with a merger regime included in the OECD CompStats database for which comparable data are available for all years.
Source: OECD CompStats database.

Although the percentage of mergers cleared with remedies was low, the use of remedies did vary within the region. Some jurisdictions in the region cleared more than 10% of their mergers with remedies, while others only used them in less than 1% of the cases. In fact, the jurisdictions with the lowest number of merger decisions (including both Phase I and Phase II decisions), present the highest proportion of mergers cleared with remedies.

Figure 3.15. Total merger decisions and the proportion of decisions with remedies over total decisions for the period 2015-2020, per jurisdiction



Note: Data from the 9 jurisdictions with a merger regime included in the OECD CompStats database for which comparable data are available for all years.
Source: OECD CompStats database.

Conclusion

The number of notifications of mergers has been growing in the region, partially explained by some changes to the merger regime in some jurisdictions. The intervention rate measured by prohibitions and remedies is low, but this is broadly in line with other jurisdictions around the world.

Use of economics in merger review in Asia-Pacific

In many jurisdictions around the world, economic analysis has played an increasingly important role in merger investigations over the past few decades (OECD, 2020[19]). Effective merger enforcement relies on the merger assessment being firmly rooted in evidence and economic analysis is often key in interpreting this evidence (OECD, 2018[20]). Since merger review is a forward-looking exercise, the assessment includes an analysis of future market structure and dynamics with the likely effects of the transaction, rather than the review of the past structure of the market. Economic analysis can play a crucial role in analysing how a transaction or conduct may influence the ability and incentives of firms to behave on the marketplace and the effects thereof – thus helping to identify and build possible theories of harm, their likelihood as well as explain any potential efficiencies. This is complemented also by assessing the evidence and data using qualitative and quantitative tools.

It is important to emphasize that the role of economists is much more than the use of complicated econometric techniques, statistical tools, or quantitative techniques such as Upward Pricing Pressure (UPP) or Gross Upward Pricing Pressure Index (GUPPI). Instead, economics should provide the conceptual framework and the necessary analytical tools to support an analysis of how the merger will change the incentives of the merging firms and what the impact will be on market functioning. In most merger cases, authorities in Asia-Pacific and elsewhere rely on its merger assessment on qualitative

analysis (such as the closeness of competition, barriers to entry and expansion, and countervailing buyer power). Such qualitative evidence is obtained from the merging parties' internal documents, as well as market investigations with suppliers, customers and/or competitors. This qualitative evidence allows authorities, sometimes with quantitative evidence, to assess economic theories of harm and reach robust conclusions. Box 4.2 will elaborate on the role of qualitative evidence in the Competition and Consumer Commission of Singapore's (CCCS) investigation into the Grab-Uber merger. This qualitative evidence helped define the relevant market, indicating that the merger parties consider their services as close substitutes.

Therefore, economics can be of value in each step of a merger review, from evidence-gathering stage to the stage of the assessment of remedies.

A wide spectrum of economic tools and techniques, including both quantitative and qualitative analyses, has been used in merger investigations[44], some Asian-Pacific jurisdictions discussed the paramount role of economics in their merger review and how both theoretical and empirical approaches are complementarily used.

Indonesia highlighted that most of the Indonesia Competition Commission's (ICC) merger analysts are economists, taking part in all the teams assigned to assess mergers and acquisitions, and are integrated throughout every stage of the merger review process. In addition, for more complicated cases, such as mergers in multi-sided digital markets, ICC often employs external economists, to assist the internal teams in defining the relevant markets and applying advanced techniques.

Singapore's contribution elaborated on factors that influence the choice of the analysis techniques used by the economic team of the Competition and Consumer Commission of Singapore (CCCS). The availability of high-quality data, their ease of collection, the complexity of the merger in question, and the resources available are the most important determinants for the selection of the economic tools. As in the case of Indonesia, CCCS can sometimes engage external economists to review or complement the case teams' analysis, recommending improvements to the techniques and methodologies used or performing an in-depth merger assessment for certain cases.

Tools and methodologies to assess a merger are chosen on a case-by-case basis. Authorities in Asia-Pacific conduct complex quantitative analysis – mostly in Phase 2 reviews where the time to review the case is sufficient for extensive data collection and the use of advanced and econometric techniques that require a longer time frame – as well as simpler techniques for when the review time is limited.

Jurisdictions in the region use a variety of quantitative techniques. These techniques range from the traditional economic analysis techniques such as the calculation of market shares, diversion ratios, Herfindahl–Hirschman Index (HHI), and concentration ratios, to the more advanced quantitative and econometric techniques such as the Upward Pricing Pressure (UPP), Compensating Marginal Cost Reductions (CMCR), and merger simulation models (OECD, 2020[21]). Although the use of more advanced techniques can in some cases strengthen the assessment, it requires higher data quality, and often substantially more time to execute, as well as advanced analytical and professional skills of the team. Quantitative data can be an important complement to qualitative analysis and vice versa.

[44] Contributions for the Session III of the Global Forum on Competition on Economic Analysis in Merger Investigations available at: https://www.oecd.org/daf/competition/economic-analysis-in-merger-investigations.htm

Box 3.1. The Grab/Uber Merger in ASEAN

On 26 March 2018, Grab announced the acquisition of Uber's business in Southeast Asia. The transaction was subject to antitrust scrutiny in several ASEAN Member States, namely Malaysia (still pending), the Philippines, Singapore and Viet Nam.

Viet Nam

Under the 2004 competition law applicable at the time of the transaction, a notification to the Viet Nam Competition Authority (VCA, now Viet Nam Competition and Consumer Authority) was required if the combined market shares of the merging parties exceeded 30% or 50%. Grab did not notify the transaction and the VCA considered that Grab had not provided sufficient evidence to prove the claim that it fell below the thresholds and launched a formal investigation in May 2018. The VCA cleared the merger finding that evidence was not conclusive on whether post-merger the new entity would hold more than 50% market share and therefore did not prohibit it.

Philippines

The Philippine Competition Commission (PCC) approved the Grab/Uber transaction in August 2018 subject to commitments. The PCC found that the transaction would likely result in a substantial lessening of competition in the market for on-demand private transportation online booking services through a mobile ride-hailing application.

It found that Grab had 93% of TNVS (Transport Network Vehicle Services) registered vehicles and the transaction would strengthen its dominance in the relevant market. This would allow it to profitably increase its prices and reduce quality of services in light of its high market share and the significant barriers to entry into the market. The PCC based its findings on a large body of evidence from different sources, including the parties' submissions, data obtained from third parties as well as surveys and studies specifically commissioned for the case under scrutiny. It analysed the pricing model of the parties and found that, although there is price regulation concerning the base fare, they have some flexibility in determining the final rate and can impose higher prices based on the variable range and surge rates. To gather information on actual prices and booking conditions, the PCC analysed more than 25 thousand booking requests over different time periods.

In light of the above, the PCC cleared the transaction subject to several commitments. These include inter alia non-exclusivity commitments (whereby Grab would not introduce any exclusivity provisions in the agreements with drivers and operators, in any possible form, including incentives or sanctions that would eventually result in exclusive membership or use of the Grab app).

Singapore

The Competition and Consumer Commission of Singapore (CCCS) opened an investigation in March 2018 and imposed interim measures to reduce the impact of the transaction on drivers and riders while the scrutiny was ongoing.

In the final decision, based on Uber's internal documents, CCCS found that, absent the transaction, Uber would have continued its operations in Singapore, possibly in cooperation with other market players. The transaction removed Grab's closest competitor in ride-hailing platform services. Furthermore, Grab had already announced changes to its reward scheme and reduced the number of points earned by riders for each dollar spent on a trip as well as increased the fares by 10-15%. Finally, CCCS found that Grab held 80% market shares in a market with high barriers to entry due to the strong network effects that made it difficult for potential entrants to scale up. Grab's exclusivity provisions with drivers and other taxi companies further hampered the ability of potential competitors to enter the market as they reduced their access to drivers and vehicles. The final decision imposed a total of $13 million financial penalties on the parties for completing the transaction without seeking CCCS's approval. It also included several remedies imposed on the parties, namely removing the exclusivity on drivers and with taxi fleets.

The way in which competition authorities apply economic analysis in merger review, as well as some of the quantitative and qualitative tools used for such analysis, is often indicated by the authorities in their merger guidelines. In Asia-Pacific, 9 out of the 12 jurisdictions in the CompStats database with an active merger control regime have issued guidelines on substantive matters.

The most common economic tool that authorities in Asia-Pacific rely on in its analysis are market shares and concentration measures. In many cases, market shares are decisive for reaching conclusions on whether to allow or prohibit a merger. However, some of the authorities also complement these tools with other tools such as an analysis of potential competition or entry barriers. Well-established authorities such as Australia and Japan consider also tools to be used in digital markets, particularly for defining the relevant market, such as the use of two-sided market definitions to perform price scrutiny.

Although some jurisdictions in the region do use sophisticated economic analysis when needed and possible, they are not described in the available merger guidelines in the region. One exception is New Zealand that issued a complementary advisory note in 2018 to their merger guidelines on how to use quantitative analysis in mergers (see also Box 4.3.).

Box 3.2. Guidelines on the use quantitative analysis in merger review in New Zealand

In December 2018, the New Zealand Commerce Commission issued an advisory note on how to use quantitative analysis as evidence that can help in the examination of transactions. Particularly, the authority stresses the utility of sophisticated tools to support theories on market definition, dynamics among competitors or counter-factual scenarios to address potential concerns, emphasizing that the weight placed on quantitative and qualitative evidence will vary from case to case so that no one type of evidence or analysis is necessarily superior to another.

The advisory note includes some principles to apply to any quantitative analysis considered during the Commission's decision-making, as well as specific examples of analysis to perform. These include critical loss analysis, correlations, calculation of diversion ratios, upward pricing pressure measures, and entry analysis. The guidelines also discuss possible econometric techniques (mainly, regression analysis) to estimate and test empirical relationships between variables, as well as merger simulations for estimating the effects of mergers.

Source: Commerce Commission New Zealand. How to use quantitative analysis in your merger analysis. December 2018. Available at : https://comcom.govt.nz/__data/assets/pdf_file/0010/111520/How-to-use-quantitative-analysis-in-your-merger-analysis-Advisory-note-December-2018.pdf

4 Economics in competition

Economics as an analytical tool for competition cases

Economic analysis plays an increasingly important role in many aspects of competition enforcement. It provides an analytical framework for the analysis of markets, – including market failures, levels of competition and efficient or inefficient outcomes – and the effect of conduct on markets (OECD, 2018[22]).[45] In many jurisdictions, "*economics is now the foundation of virtually every case in the central areas of competition policy: mergers, single-firm conduct and cartels*" (Boyer and Ross, 2017[23]). This is partly driven by the increased use by certain competition authorities of an effect-based approach, instead of a form-based one, where economic tools allow them to predict or gauge such effects or determine counter-factual scenarios and potentially different allocation of resources in the markets.

In practice, economics plays an important part in measuring market competition. Competition authorities measure market competition for broadly three reasons. The first one is to apply competition law in markets affected by mergers and potential abuse of dominance (competition enforcement). The second reason is to assess whether pro-competitive intervention is needed and whether such intervention is likely to be net beneficial (competition advocacy). The third reason is to assess ex-post the effectiveness of competition policy of an authority (OECD, 2021[24]). The measurement of competition is generally not straightforward. Thus, authorities around the world, including those in Asia-Pacific, have used a wide range of measures that generally relate to the structure and performance of the market. Moreover, they vary in sophistication, use different theoretical backgrounds and have diverse intensities of use of data and resources.

Whilst measuring empirically the increased use of economics by competition authorities is a complex and heavy exercise some proxies can be used. One such proxy is the size of the market for competition economics, measured by the number of economists in competition consulting. Between 2002 and 2020, the number of competition economists in the top-21 economic consulting firms in the world grew globally by an average of 10 percent per year (OECD, 2018[25]). In 2020, the top-21 consulting firms employed 2 526 competition economists worldwide.[46] A similar increase is observed when analysing the number of antitrust litigation cases dealt with by these top-21 economic consulting firms in the world. From 218 cases in 2014, these consultancies dealt with more than 950 cases in 2017[47], representing an increase of more than 340% in four years, or a compound annual growth rate of 45%.

From the public enforcers' perspective, the increase in the use of economics has also had an impact on the institutional set-up of the competition authorities. For example, the European Commission was one of the first authorities in Europe to create the position of Chief Economist and establish a Chief Economist Team in 2003. By 2020, more than 85% of the top 35 competition enforcement authorities in the world had created a stand-alone economics bureau within their authority and had created a position for a Chief Economist[48]. Moreover, more than 44% had created a separate data analytics unit.

[45] See also, for example, (Spector, 2011[36]), (Ginsburg and Fraser, 2011[54]) and (Hildebrand, 2016[37]), among others.

[46] OECD Secretariat calculations based on Global Competition Review, GCR 100 2021 Economics 21 (Available on: Global Competition Review - GCR 100).

[47] Ibid.

[48] OECD analysis based on Global Competition Review Rating Enforcement 2021.

Economics in competition in Asia-Pacific

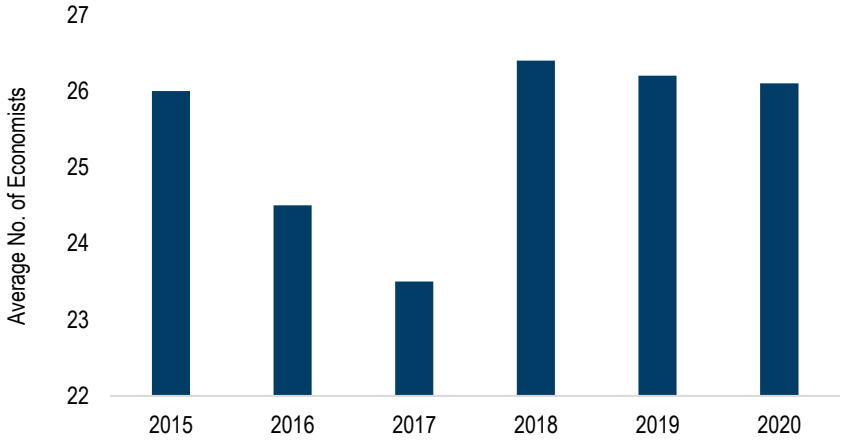
Similar to other parts of the world, several jurisdictions in Asia-Pacific are increasingly using economic analysis in competition enforcement cases. However, the increased use of economics in the region has led to a modest increase in economic consulting firms present in Asia-Pacific and economists employed by the competition authorities.

Of the top-21 economic consultancy firms in the world mentioned above, 11 have a physical presence in Asia-Pacific. From those that do not, many take on cases in Asia-Pacific, but through their headquarter offices in Europe or the United States.[49] Furthermore, most competition consulting firms seem to be concentrated in a small group of jurisdictions in the region, mainly where more experienced competition authorities are located, namely Australia; Hong Kong, China; Japan, New Zealand; Korea and Singapore. With the development of some of the younger regimes, this may change over time.

Concerning the presence of economists in competition authorities, the average number per authority has been stable in the region over the past six years, even though this number differs substantially between jurisdictions. The average authority employed 26 economists (see Figure 4.1), a number below OECD jurisdictions that employed on average 35 economists in 2020[50], with some authorities in the Asia-Pacific region employing from 3 economists to two others employing 79 in 2020 (see Figure 4.2 and Figure 4.3).

It is likely that the make-up of several of the competition authorities in the region, including the presence of economists, will change with the development of the younger competition law regimes. Between 2015 and 2020, 5 out of the 9 authorities had already increased their number of economists.

Figure 4.1. Average number of economists working for the competition authorities in Asia–Pacific per year, 2015-2020

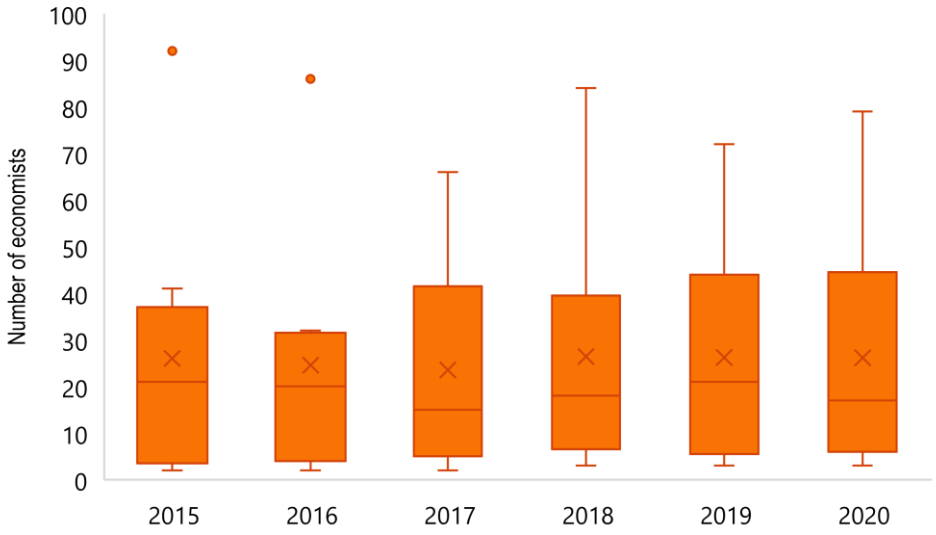


Note: Data from the 9 jurisdictions in the Asia-Pacific region for which comparable data are available for all years in the OECD/KPC Questionnaire.
Source: OECD/KPC Questionnaire.

[49] OECD Secretariat research based on Global Competition Review, GCR 100 2021.

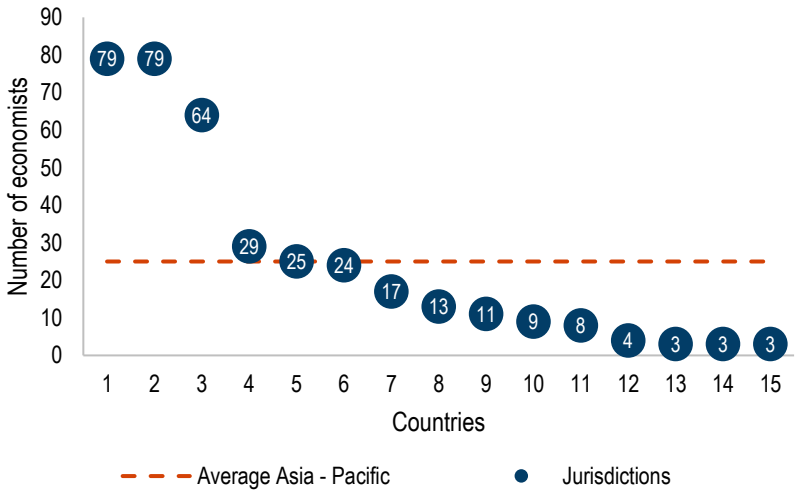
[50] Based on a sample of 30 OECD Jurisdictions. Source: OECD Analysis based on GCR – Enforcement Hub 2021. Available at: https://globalcompetitionreview.com/insight/enforcer-hub/2021

Figure 4.2. Distribution of the total number of economists working for the competition authorities in Asia – Pacific per jurisdiction, per year, 2015-2020



Note: Data from the 9 jurisdictions in the Asia-Pacific region for which comparable data are available for all years in the OECD/KPC Questionnaire. The graph illustrates the distribution of the number of economists per year among the region. Each year presents minimum and maximum values and the "boxes" represent the lower (25%) quartile, upper (75%) quartile and the median (the line inside each box). The "X" in each box represents the mean (i.e. the average) and the dots represent values that can be considered as statistical outliers.
Source: OECD/KPC Questionnaire.

Figure 4.3. Total number of economists working for the competition authorities in Asia – Pacific in 2020 and the average number in the region

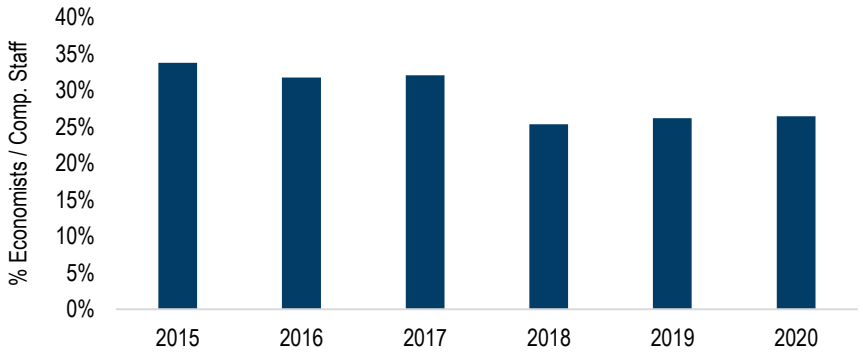


Note: Data from the 15 jurisdictions in the Asia-Pacific region for which data is available for 2020 in the OECD/KPC Questionnaire.
Source: OECD/KPC Questionnaire.

When looking at the number of economists as a proportion of total competition staff in the authorities of the region, this percentage has been stable over time with an average of 33% over the past 6 years, a percentage that is above the average for OECD Jurisdictions where the proportion of economists over total

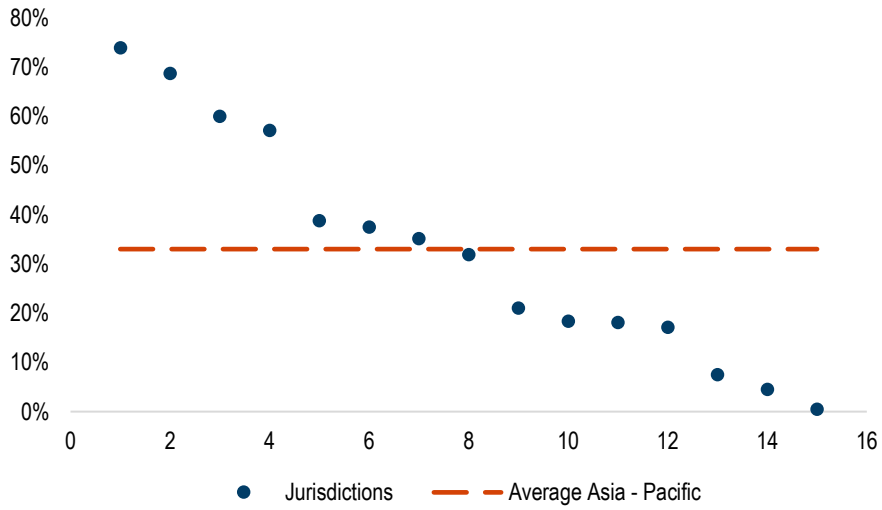
competition staff was 24.5% in 2020[51]. However, again the differences are substantial between jurisdictions, with some jurisdictions having a lower proportion located between 5% and 20% (see Figure 4.4 and Figure 4.5).

Figure 4.4. Economists as proportion of total competition staff in Asia–Pacific per year, 2015-2020



Note: Data from the 9 jurisdictions in the Asia-Pacific region for which comparable data are available for all years in the OECD/KPC Questionnaire.
Source: OECD/KPC Questionnaire.

Figure 4.5. Economists as proportion of total competition staff in Asia–Pacific in 2020 and the regional average



Note: Data from the 15 jurisdictions database in the Asia-Pacific region for which data is available for 2020 in the OECD/KPC Questionnaire.
Source: OECD/KPC Questionnaire.

Application of economic analysis in competition enforcement

There are two main areas in competition enforcement where economic analysis plays an important role: merger review (see previous chapter) and abuse of dominance. While all jurisdictions have their own

[51] Based on a sample of 30 OECD Jurisdictions. Source: OECD Analysis based on GCR – Enforcement Hub 2021. Available at: https://globalcompetitionreview.com/insight/enforcer-hub/2021

competition law and institutional design, economics can provide a consistent analytical framework. Hence, it serves as a "language of convergence" when analysing competitive dynamics in markets, their outcomes and efficiency properties, and the way these variables are affected by conducts of specific players in the market.

For unilateral conduct cases, the economic analysis plays a crucial role to distinguish behaviours that in one context may be pro-competitive and in another anti-competitive, depending on market power. This starts with the market definition, a useful tool for determining market shares, widely used as a first indicator of market power. To understand the potential presence of market power, one can use economic tools to understand the determinants of market outcomes, such as demand, costs, price structures and incentives, as well as other key elements to determine potential theories of harm of the conduct of companies in such markets. Subsequent steps in which economic analysis can play an important role are the analysis of entry barriers, potential competitors and buyer power, among others, that allow competition authorities to reach conclusions on the impact on competition of determined behaviours.

Economics could help to empirically estimate the link between market structure and price, identify firms' competitive conduct, support damage estimation, and other approaches to the quantitative assessment of the effects of anti-competitive behaviours. It is important to highlight that the use of economics does not necessarily refer to the use of quantitative techniques. A wide variety of qualitative analysis exists that includes economic fundamentals, to assess whether a firm has substantial market power.

While economic resources differ substantially between authorities in the region, the same is true for guidance around how to use economics and the actual use of economics in competition enforcement. In many jurisdictions in the region, only relatively traditional economic analysis is provided for in guidelines or is used in practice. Market shares in many jurisdictions are often still the only, or decisive, measure of analysis for reaching conclusions (OECD, 2018[15]).

Regarding abuse of dominance cases in Asia-Pacific, the number of enforcement cases is limited as discussed in a previous section. On average, each of the jurisdictions in the region decided one abuse of dominance case per year, with several jurisdictions having zero cases in most of the years analysed.

Given the increasing importance of economics in competition enforcement this has been one of the focus areas of the OECD/KPC in the past years[52]. Such discussions demonstrated that economics could serve as a common language among the different competition policy designs in the region.[53]

[52] Out of 31 events organised in the past five years (between 2016 and 2020) in the Asia-Pacific region, 20 were explicitly on economics-related discussions to create awareness, share knowledge and build capacity. Five more events did not focus explicitly on economics, but had it covered as an important element of. For a complete list of the events see: https://www.oecd.org/korea/oecdkoreapolicycentrecompetitionprogramme.htm.

[53] These events included workshops on competition economics, market definition, competition in specific sectors, market studies, among others. The 5 additional events that did not have economics as a main topic but touched upon economic analysis, included meetings on leniency programmes and fines, as well as workshops related to competition policy responses to COVID.

Box 4.1. OECD/KPC Mini-Course on Competition Economics for ASEAN

The OECD/KPC organized in October 2020 together with the Asian Development Bank and The Philippines Competition Commission a Competition Economics mini-course on Merger Control and Abuse of Dominance. It was held by Prof. Massimo Motta of Universitat Pompeu Fabra, and Barcelona Graduate School of Economics and Prof. Chiara Fumagalli of Bocconi University.

Representatives from 10 Asian-Pacific competition authorities (Brunei Darussalam, Cambodia, Indonesia, Korea, Lao People's Democratic Republic, Malaysia, Myanmar, The Philippines, Singapore and Thailand) attended the workshop and actively engaged in the discussions. In total, more than 100 participants were present throughout the eight days of the webinar.

The abuse of dominance workshop aimed to provide the participants with a thorough understanding of the most recent economic theories of abuse of dominance, help them apply these concepts in practice, and review actual cases in the light of an economic approach. It was followed by the presentation from Prof. Fumagalli. It was divided into basic concepts, predation, discounts and conditional rebates, exclusive dealing, tying and bundling, and vertical foreclosure. In the context of discounts and conditional rebates, Prof. Fumagalli highlighted that rebates can represent a form of price discrimination. Abstracting from exclusionary motives, price discrimination is, however, not necessarily welfare detrimental. She also explained several economic models regarding the welfare effects of price discrimination. Prof. Fumagalli underlined that in particular discounts conditional on exclusivity raise more severe anti-competitive concerns. This assumption is based on several economic reasons. For instance, they may allow the incumbent to secure the crucial buyers while limiting the distortions on sales to those buyers. Exclusivity rebates may be directly profitable because of a demand-boosting effect. Exclusionary effects can be even stronger when 'all-or-nothing' clauses are implemented i.e. the dominant firm threatens buyers not to supply them at all if they reject a rebate offer. However, one should bear in mind that the economic theory does not suggest that individualized rebates and exclusivity rebates should be per se prohibited. Efficiency could also apply to exclusivity rebates and ultimately intensify competition.

Prof. Fumagalli presented a number of cases, including the Intel case (microchip manufacturer) in the European Union as an illustrative example for retroactive loyalty rebates. She explained that the as-efficient competitor test played an important role in the assessment of whether the rebate scheme at issue was capable of having foreclosure effects on as efficient competitors. She then covered the US-case ZF Meritor vs. Eaton in the heavy-duty truck transmission market. Prof. Fumagalli explained that the Court considered economic arguments, and assessed height of entry barriers, extent of Eaton's market power, duration of the agreements, their coverage, evolution of Meritor's market shares, and potential pro-competitive justifications. She also elaborated on the differences compared to the Intel case.

Prof. Fumagalli also presented economic insights regarding implicit and explicit price discrimination, uniform pricing, and effective pricing. In this context, she also provided illustrative examples.

The workshop was a well-balanced mix of theory and practical case studies and exercises. There was also room for discussions.

Embedding economics in the institutional design of an authority

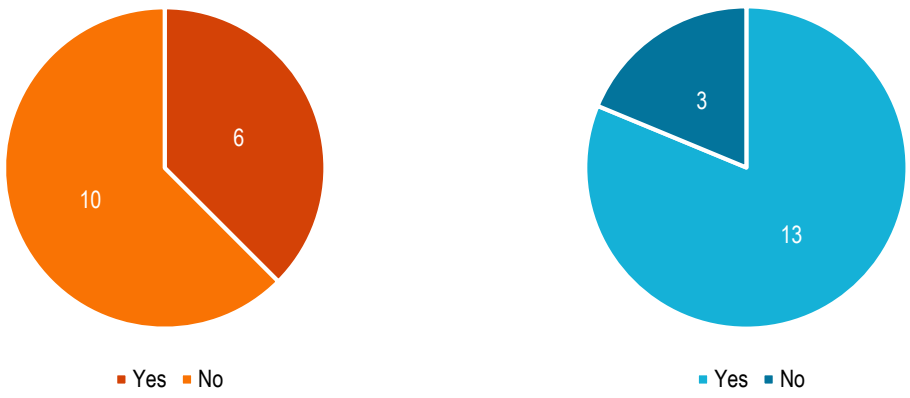
Institutional design can play an important part in the success of a competition law and policy regime. Competition authorities have been effective with very different designs, including different mandates, different degrees of independence from the government and varying governance structures within the authority (OECD, 2015[26]).

As part of the internal governance of authorities, measures taken to initiate cases, investigate cases and decide on them, form a part of its institutional design. For example, the combination of skills within case teams can significantly contribute to the effective handling of investigations. Therefore, authorities have developed multiple strategies to effectively allocate their staff (OECD, 2015[26]).

In this sense, the way in which economic analysis is embedded in an authority can also differ, as authorities can choose different models. One of them could be to simply hire economists as part of the competition staff without establishing a separate economics unit. Another could include the establishment of an economics unit with or without an economist who leads the economic analysis the authority performs. Finally, yet importantly, taking an approach to formally establish the way the economics unit will take part in the analysis: either by directly being part of the case-handling team, by taking an advisor role to the case handlers or as a hybrid between the two formats.

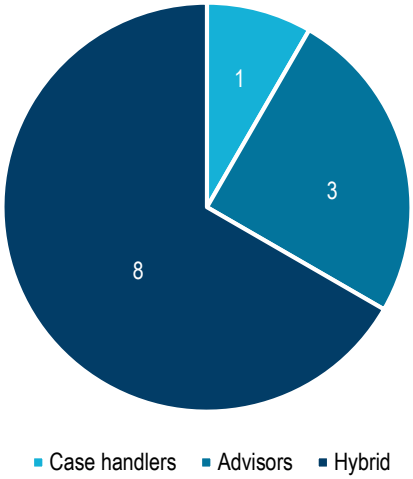
In our sample, 13 out of 16 jurisdictions have created one separate economics unit, which represents 81.2% of the jurisdictions. This percentage is materially similar to the OECD, where 82.9% of the jurisdictions reported to have one for 2020. Moreover, 10 out of 16 jurisdictions in the region have a principal economist or similar, this is, 62.5%, a low percentage in comparison to 85.7% for OECD jurisdictions. A hybrid role for such unit is the most common approach in the region, with 8 out of the 13 authorities having their economists both as case handlers and as case advisors (see Figure 4.6 and Figure 4.7).

Figure 4.6. Number of jurisdictions in Asia-Pacific with a principal economist (or similar) (left) and a separate economics unit (right) and in 2020



Note: Data from the 16 jurisdictions that replied to the OECD/KPC Questionnaire.
Source: OECD/KPC Questionnaire.

Figure 4.7. Role of the economics units on the Asia – Pacific's competition authorities in 2020



Note: Data from the 12 jurisdictions that replied to the OECD/KPC Questionnaire with an economics unit that provided information about its role.
Source: OECD/KPC Questionnaire.

Conclusion

In summary, many authorities already rely on traditional economic analysis for decision-making, but more sophisticated economic analysis in competition enforcement in Asia-Pacific is increasing. This increased use of economics in the region has led to a modest increase in economists employed by the competition authorities. Between 2015 and 2020, five out of the nine authorities had already increased their number of economists, even though the total number of economists in the region remained rather stable. However, it is likely that the make-up of several of the younger competition authorities in the region will change with their development, including the presence of economists.

5 Impact of COVID-19

In recent decades, Asia-Pacific has been one of the fastest-growing regions in the world in terms of GDP growth and development (OECD, 2021[27]). However, as almost anywhere in the world, the COVID-19 pandemic has triggered an economic recession across nearly the entire region, although its magnitude varied across jurisdictions. After a negative economic growth in most of the region, the Asian Development Bank (ADB) forecasts the output of "developing Asia" to expand by 7.1% in 2021 and 5.4% in 2022, supported by a broad recovery in exports, regional growth paths are diverging (Asia Development Bank, 2021[28]).[54]

Asia-Pacific has been severely affected by the pandemic due to large international interlinkages and the importance for the region of global supply chains. At the start of the pandemic, governments across the world undertook a range of measures to contain the pandemic, including increased public health advice and monitoring, restrictions to inbound and outbound travel, and outright lockdown of affected areas, to prioritise the containment of the epidemic over economic growth. However, with the severity of the economic impact of the crisis, government responses have evolved to include measures to contain the impact on key sectors and to boost recovery.

The ADB identified several risks resulting from the COVID-19 pandemic that cloud Asia's economic outlook. They include the handling of new emergencies from variants of the virus, vaccine rollouts, geopolitical tensions, financial turmoil, and disruptions to global supply chains (Asia Development Bank, 2021[28]). The economic recovery will largely depend on each country's ability to manage possible new waves of the pandemic, as well as on the ability of governments to support the economy (OECD, 2021[29]). For the majority of jurisdictions in the region, fiscal and monetary policies continue to be supportive of economic recovery in Asia-Pacific.

Competition authorities can play a fundamental role in assisting governments recovering from the COVID-19 pandemic, notably by contributing to well-functioning markets that will support a faster and more sustained economic recovery. Ways in which competition authorities can help governments, include advocacy to help policymakers take account of unintended consequences on markets from government intervention to enforcement powers for preventing anti-competitive conduct (OECD, 2020[30]). In this sense, competition authorities could play a key role in different stages of the economic recovery (Maximiano, 2021[31]).

Economic impact of COVID-19 and government restrictions

The world's GDP declined by 3.4% in 2020, and 4.9% in OECD countries, becoming the largest fall since 1962 (OECD, 2021[32]). Large parts of Asia-Pacific have been highly affected, as many countries in the region depend on international trade and tourism, while supply chains have come under large stress. For instance, GDP decreased by 5.6% in South Asia, while East Asia was the only sub region that reported a positive but low growth rate (see Table 5.1).

[54] "Developing Asia" comprises the 46 members of the Asian Development Bank and excludes Australia, Japan and New Zealand.

Table 5.1. Gross domestic product growth in Asia-Pacific

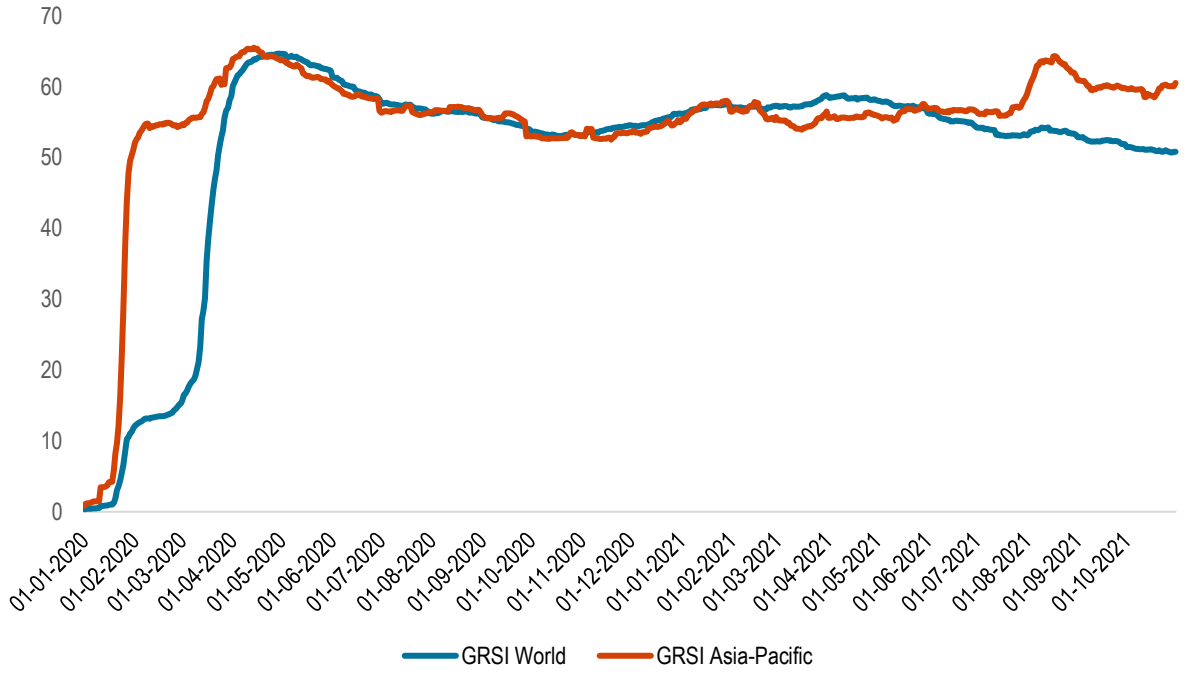
Gross Domestic Product Growth per Region	Forecast for 2020 before the pandemic*	2020 reported values**	Forecast for 2021**	Forecast for 2022**
Developing Asia	5.2	-0.1	7.1	5.4
Central Asia	4.5	-1.9	4.1	4.2
East Asia	5.2	1.8	7.6	5.1
South Asia	6.1	-5.6	8.8	7.0
Southeast Asia	4.7	-4.0	3.1	5.0
The Pacific	2.5	-5.3	-0.6	4.8

Note: Developing Asia refers to the 45 members of the Asian Development Bank. Central Asia comprises Armenia, Azerbaijan, Georgia, Kazakhstan, the Kyrgyz Republic, Tajikistan, Turkmenistan, and Uzbekistan. East Asia comprises Hong Kong, China; Mongolia; the People's Republic of China; the Republic of Korea; and Chinese Taipei. South Asia comprises Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka. Southeast Asia comprises Brunei Darussalam, Cambodia, Indonesia, the Lao People's Democratic Republic, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Viet Nam. The Pacific comprises the Cook Islands, the Federated States of Micronesia, Fiji, Kiribati, the Marshall Islands, Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Timor-Leste, Tonga, Tuvalu, and Vanuatu.
** Refers to forecasts presented in the Asian Development Outlook 2019 (September Update)*
*** Refers to real values and forecasts presented in the Asian Development Outlook 2021 (September Update)*
Source: Asian Development Outlook 2019 (September Update) and Asian Development Outlook 2021 (September Update)

The way in which countries have responded to contain the pandemic and mitigate its economic impact differs significantly around the world, although most countries have introduced societal restrictions. Figure 5.1 presents the daily average of the Oxford COVID-19 Government Response Stringency Index[55] (GRSI) in Asia-Pacific and the world for the period between January 2020 and September 2021. This GRSI measures the variation in governments' responses to COVID-19, for instance around school closures, workplace closures, travel restrictions, vaccination policy, and others.

[55] The Oxford Covid-19 Government Response Tracker (OxCGRT) is a composite measure that collects systematic information on policy measures that governments have taken to tackle COVID-19. The different policy responses are tracked since 1 January 2020, cover more than 180 countries and are coded into 23 indicators. This composite measure is a simple additive score of nine indicators measured on an ordinal scale, rescaled to vary from 0 to 100. Source: https://www.bsg.ox.ac.uk/research/research-projects/covid-19-government-response-tracker

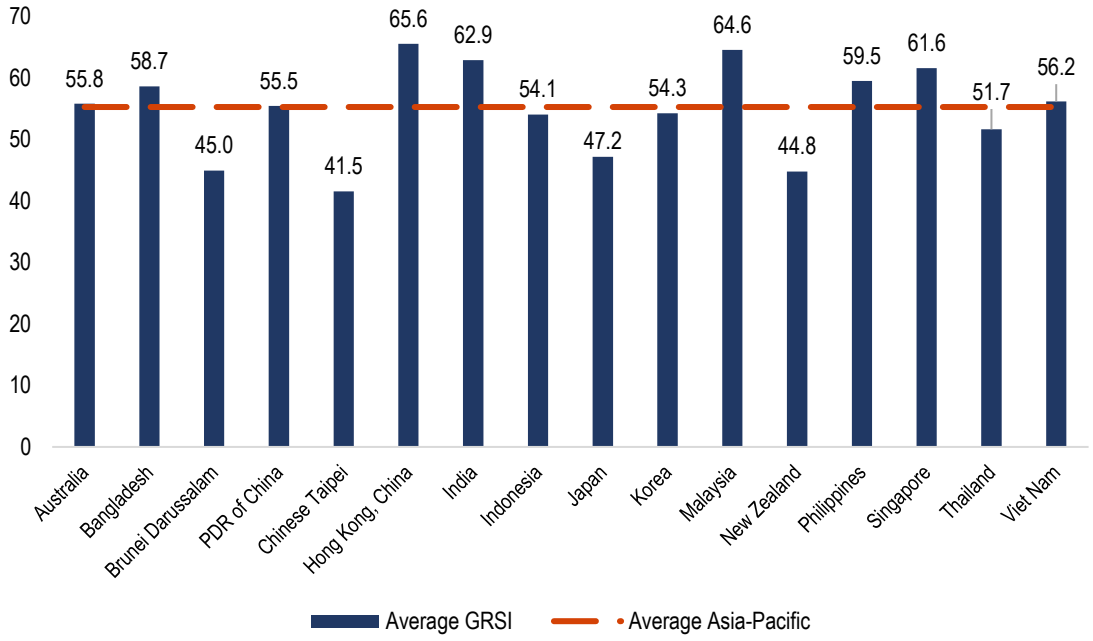
Figure 5.1. Daily GRSI average across jurisdictions per day, Asia-Pacific and World, 1 January 2020 to 31 October 2021



Note: Daily averages were calculated with information from all countries available each day. The average for Asia-Pacific was calculated with information for the 16 jurisdictions participating in the CompStats database.
Source: OECD Analysis based on the Oxford Covid-19 Government Response Tracker (OxCGRT).

Figure 5.1 indicates that the overall impact of the measures has been fairly similar in Asia-Pacific compared to the world average until approximately April 2021, i.e., the moment when vaccinations against COVID-19 became available at large scale in many parts of the world. At that point, measures were progressively relaxed in many other parts of the world, while Asia-Pacific seemed to have introduced even stricter measures. Figure 5.2 displays the GRSI score for the individual jurisdictions in the Asia-Pacific region participating in the CompStats database for the period between January 2020 to October 2021. It shows that those countries had average scores of between 40 and almost 70 and an average score of 56.5.

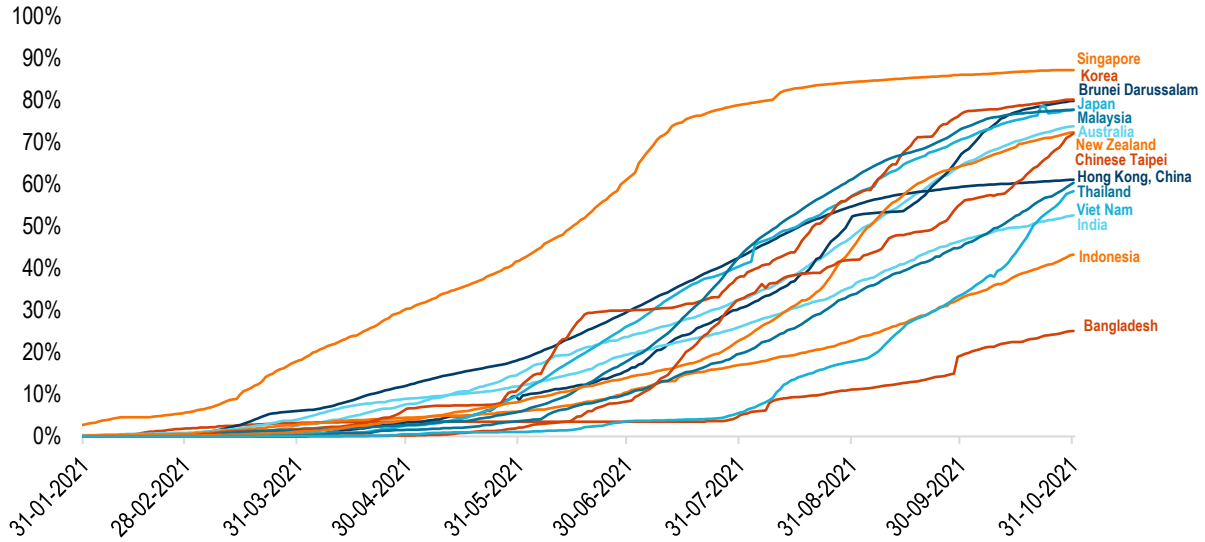
Figure 5.2. GRSI average per jurisdiction in Asia-Pacific 1 January 2020 to 31 October 2021



Note: Averages per jurisdiction were calculated with daily information from the 1 January 2020 to 31 October 2021.
Source: OECD Analysis based on the Oxford Covid-19 Government Response Tracker (OxCGRT).

Almost two years after the start of the pandemic, global GDP seems to have surpassed its pre-pandemic level. However, national and regional recovery paths differ, with countries facing different challenges in the process of emerging from the crisis. Significant differences in vaccination rates between countries have been identified as one of the main reasons for that unevenness of the recovery (OECD, 2021[33]). Firstly, new outbreaks of the virus will increase the pressure on, and disruptions in, supply chains, resulting in price increases of key products. Secondly, successfully containing the virus could result in less restrictions and a quicker restart of economic activities. Figure 5.3 shows the share of people who received at least one dose of COVID-19 vaccines per country in the Asia-Pacific region until October 2021.

Figure 5.3. Percentage of population per jurisdiction in Asia-Pacific who received at least one dose of COVID-19 vaccine



Source: OECD Analysis based on the Oxford Covid-19 Government Response Tracker (OxCGRT). The data includes the jurisdictions in Asia-Pacific participating in the CompStats database. Information on the Philippines and the People's Republic of China was not completely available.

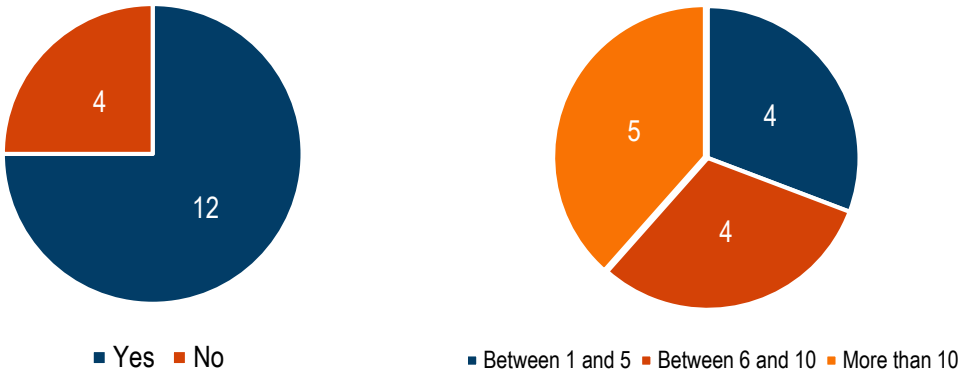
The role of competition law and policy in the road to recovery in Asia-Pacific

As mentioned, competition authorities can play a fundamental role in assisting governments in their economic recovery from the COVID-19 pandemic by contributing to a faster and more sustained economic recovery. In the emergency and recovery phases, jurisdictions are implementing policy packages to minimise the medium-long term damage to the economy. However, in doing so, governmental interventions may fail to account for unintended consequences on markets (e.g., by leading to harmful consolidation or inefficiencies). Competition authorities can contribute by assessing potential risks of government measures distorting competition, as well as by issuing opinions and proposing pro-competitive measures for the design of industrial recovery policies (OECD, 2020[30]). From an enforcement perspective, prioritising key sectors to ensure they are well-functioning markets could contribute to the growth of such industries even in the long term.

Many of the competition authorities in the Asia-Pacific region have also been involved in helping shape the economic recovery by working with other policymakers. From the 16 jurisdictions in our sample, 12 of them reported that their competition authorities have been involved in the design or development of an economic recovery package related to COVID-19. No less than 13 out of 15 stated that they had been part of meetings, in 2020, with the government or regulators, also related to the economic crisis resulting from the pandemic and the economic recovery. Of those 13, four had had between one and five meetings in the calendar year 2020, the other four had between six and ten meetings and five of them had more than ten meetings by the end of 2020 (see Figure 5.4).

Figure 5.4. Involvement of competition authorities in Asia-Pacific in helping shape the economic recovery

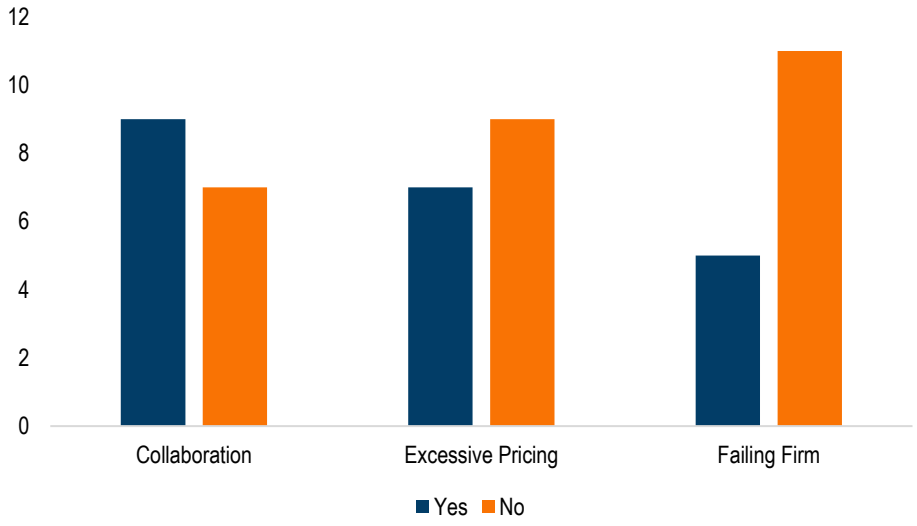
Number of competition authorities in Asia-Pacific that have been involved with the design or development of an economic recovery package (left) and the number of meetings they held in 2020 with the government or regulators, related to the economic crisis (right)



Source: OECD/KPC Questionnaire.

Many competition authorities in the Region have also played an active role by allowing temporary cooperation and collaboration agreements considering the factual circumstances, to strongly enforce rules against anti-competitive practices and behaviour that could affect consumers. From the sample of 16 jurisdictions, nine of them reported to have had issued opinions or comfort letters to private entities during the COVID-19 crisis regarding collaboration between competitors: seven on excessive pricing, and five on failing firm arguments in merger control (see Figure 5.5).

Figure 5.5. Number of competition authorities in Asia-Pacific that had issued opinions or comfort letters to private entities during the COVID-19 crisis regarding collaboration, excessive pricing, and failing firm



Source: OECD/KPC Questionnaire.

This is supported by a database developed by the World Bank on competition measures implemented by the authorities to mitigate COVID-19 effects (World Bank, 2021[34]). This database shows that most competition authorities in the region have taken measures to tackle issues emerging from the crisis. The main competition measures in this database, taken by the authorities in Asia-Pacific, can be divided into 5 main types: allowing cooperation and collaboration, price controls, actions against price gouging, enforcement against the backdrop of the crisis, temporary relief of competition laws or regulations (including simplified merger review procedures).[56] While many of these measures pertain to specific sectors, many measures affect all the sectors in the economy.[57] Below, these five categories will be briefly explained.

Regarding cooperation and collaboration, multiple authorities in the region[58] recognised that their laws included provisions allowing collaboration among competitors, but highlighted that such provisions only applied in exceptional circumstances and that the collaborations were to be done on a temporary basis and in specific industries to deal with disruptions and risks arising from the pandemic.

Box 5.1. Qantas and Japan Airlines collaboration agreement in COVID-19: the analysis done by the ACCC

Qantas and Japan Airlines applied for a three-year authorisation to the ACCC of an agreement that included full co-ordination on passenger and cargo operations between Australia and Japan on marketing, sales, pricing, schedules, and inventories, among others[1]. The ACCC denied the authorisation because of a very high likelihood of reduction of competition and the absence of efficiencies or benefits to consumers that could outweigh such harm.

In the assessment, the ACCC weighed short-term benefits of the alliance, such as the easiness to reinstate services and the stimulus for tourism after the COVID-19 crisis with long-term benefits that would be eliminated if they granted the authorisation. The authority relied on market shares and qualitative analysis of the entry barriers and potential competition in the market[2] to conclude that the preservation of competition, this is, a scenario without the alliance, would mean cheaper flights with better services, which, according to the economic theory of sustainable growth, is vital to the recovery of tourism and growth, not only in the short term, but also in the coming years.

Notes:
[1] ACCC Press release on Qantas and Japan Air Alliance. Available in: https://www.accc.gov.au/media-release/accc-finds-qantas-and-japan-airlines-alliance-not-in-the-public-interest
[2] In 2019, Qantas and Japan Airlines had an average joint market share of 85% of passengers travelling in the routes between Australia and Japan. They were each other's closest competitors on the largest route, Sydney-Tokyo, and the only airlines operating on the second largest route, Melbourne-Tokyo.

[56] Based on a survey of 17 jurisdictions in the region: Australia; Chinese Taipei; Fiji; Hong Kong, China; India; Indonesia; Japan; Lao People's Democratic Republic; Malaysia; New Caledonia; New Zealand; Pakistan; People's Republic of China; Philippines; Singapore; Thailand and Viet Nam.

[57] Source: OECD research based on (World Bank, 2021[34]) and contributions by the jurisdictions for the 5th Asia-Pacific High Level Representatives Meeting the OECD held on the 16th of December 2020.

[58] Namely authorities from Australia; French Polynesia; Hong Kong, China; India; Japan and New Zealand.

With respect to prices, the authorities in Asia-Pacific took varied measures that went from enforcement actions such as the start of investigations and price monitoring against price gouging[59], to advocacy opinions and enforcement of direct price controls on specific products, mostly from health and medical markets[60].

Other enforcement actions against the backdrop of the COVID crisis included actions such as accepting commitments and foregoing fines due to disruptions of businesses activities[61] and initiating investigations for conducts appearing during the crisis[62]. Some authorities even created internal COVID-19 taskforces to monitor markets and take actions related to conducts coming from the crisis[63].

With respect to merger regimes, as mentioned in the dedicated chapter above, some authorities also took certain measures, either to relax their procedures during the pandemic. Indonesia, for example, relaxed notification deadlines and the Philippines did the same, whilst also introducing a simplified procedure for certain transactions and a temporary increase in thresholds. In the context of temporary increase in thresholds, it should be noted that the relaxation of legal standards in merger control should be analysed very carefully, since the risk of this leading to highly concentrated markets and the creation of significant entry barriers surpasses short-term benefits of preventing insolvency and contributing to financial stability (OECD, 2020[30]).

Other authorities in Asia-Pacific took measures to review some transactions that could become problematic in times of crisis. The Japanese Federal Trade Commission (JFTC) issued guidelines describing exceptional situations where the authority could substantially review transactions that do not normally meet the thresholds, while the ACCC, in Australia, started reviewing mergers related to digital platforms.

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[59] The People's Republic of China, for example, started monitoring e-commerce platforms' prices of health and medical products such as protective gear and hand sanitizer. Competition Authorities in Chinese Taipei, Fiji, Indonesia, Malaysia and Thailand reported sanctions or ongoing investigations against companies for charging excessive prices or limiting production in retail and health products.

[60] Jurisdictions such as India, Lao People's Democratic Republic and Malaysia fixed maximum prices on COVID tests and face masks. The respective competition authorities took key roles on providing advice and inputs to governments to address shortages or competition concerns in key sectors. In Thailand, producers and sellers of face masks and hand-sanitizing gel needed to seek approval from authorities before making price changes. In japan, the JFTC published an opinion that setting maximum prices for the sale of face masks to avoid excessive prices would be justifiable under Japan's antitrust laws. ACCC advocacy efforts have also been a strong focus for the authority, mainly by educating businesses and consumers about their rights and obligations, but also through consulting with government ministries and departments on various policy issues such as industry support measures which have implications for competition.

[61] The ACCC accepted commitments related to booking refunds related to the pandemic, while the New Zealand Commerce Commission (NZCC) agreed to forgo a fine on a company for price fixing due to impact of the crisis on the business financial situation and the Malaysian Competition Commission (MyCC) granted a reduction of 25% taking into consideration financial situations on the enterprises due to COVID.

[62] For example, the Competition Commission of Pakistan opened an investigation into potential anti-competitive practices related to a shortage of petroleum products due to price reductions by the Government for low demand during the pandemic. The CCCS from Singapore also started to look into retail lease markets following complaints on imbalance of bargaining power by landlords and unfair clauses in tenancy agreements that could affect competition in the market. Finally, in Viet Nam, individuals were arrested over alleged bid rigging practices in relation to the supply of COVID testing machines. The Hong Kong Competition Commission (HKCC) started working with Government and public bodies to allow the authority to use their bidding data to identify potential cases where bid-rigging takes place.

[63] The Bangladesh Competition Commission appointed a monitoring team to oversee essential medical and consumer goods markets, with respect to pricing and availability, as well as possible anti-competitive practices. The ACCC set up internal COVID-19 recovery taskforce with the main purpose of identifying the relevant industries to focus on.

Box 5.2. Changes in merger review procedures as a strategy to tackle effects from the COVID-19 crisis

Several jurisdictions in Asia-Pacific accommodated merging parties to ensure that the review of mergers could continue during the pandemic. Examples are changes in legal provisions (such as changes in notification thresholds or notification periods), or the streamlining of the merger assessment process (for instance by allowing parties to submit documents electronically and conducting interviews remotely.

To provide ease to the review process to the notifying parties in light of the pandemic, many jurisdictions have recently relaxed some of their enforcement rules in 2020. For example, the Philippines issued specific guidance on the merger review process during the quarantine period and relaxed the 30-day notification deadline from the signature of definitive agreements, to be extended to any time before implementation. Parties were also permitted to submit their documents electronically through their online portal to facilitate the filing requirements during the quarantine period, but also parties may be interviewed remotely. Even though having a mandatory notification regime post the consummation of a transaction, Indonesia has permitted the extension of the filing deadline, upon request of the parties, to submit their merger filing within 60 days – instead of 30 days – from closing.

Source: Latham & Watkins LLP (2021), Impact of COVID-19 on Global Merger Control Reviews, https://www.lw.com/thoughtLeadership/lw-impact-of-COVID-19-global-merger-control (accessed on October 2021).

Conclusion

In conclusion, the COVID-19 pandemic has led to an unprecedented number of actions from governments and competition authorities in Asia-Pacific to restore or boost competition and tackle the effects of the pandemic in different industries. Indeed, competition authorities should not underestimate their potential role in this recovery, as effective competition is key to shaping a sustainable economic recovery.

Conclusion

This report shows that the importance of competition law and policy in the Asia-Pacific region has increased in the last 5 years. This is demonstrated by the many jurisdictions adopting new competition laws and creating competition authorities as well as upgrading and adapting their laws over time. These steps bear strong testimony to the healthy evolution of competition law and policy in the region.

While competition enforcement is uneven, the report shows that it has been increasing over time. Another apparent trend is that economics has become a staple element in the assessment of many competition cases and this can be expected to continue increasing. This increased activity and sophistication of competition activities in the region is that the agencies, especially the new agencies, have benefited from the experience of the more mature authorities via capacity building activities such as those carried out by the OECD-KPC.

The economic crisis brought about by the COVID-19 pandemic has presented new challenges for competition authorities, both for procedure and substance. The data collected shows that competition authorities in the region have been actively engaged in playing a role in the economic recovery, notably through advocacy with their governments and via enforcement actions. This can be expected to continue to drive the activity of many authorities in the coming months and years.

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