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ASIAN COMPETITION
QUARTERLY REPORT

OCTOBER – DECEMBER 2013 clearygottlieb.com

CHINA

Guangdong People's High Court upholds abuse of dominance decision against InterDigital

On October 28, the Guangdong People's High Court upheld the Shenzhen Intermediate Court's ruling finding InterDigital Company Inc. ("InterDigital") liable for violating China's Anti-Monopoly Law ("AML") and failing to license certain patents on fair, reasonable, and non-discriminatory ("FRAND") terms. The lawsuit was filed by Huawei Technology Company Limited ("Huawei"), a Chinese manufacturer and provider of telecommunications products and services, which uses among others, technology covered by several of InterDigital's patents.

Although the Shenzhen Intermediate Court decision remains confidential, it was reported that the court, which ruled on February 4, 2013, found that, with respect to the AML claim, InterDigital: (i) held a dominant position with respect to a market defined by the scope of at least one of its standard essential patents ("SEPs"); and (ii) abused such position by

- tying a license to such SEPs to licenses for non-essential patents; and
- seeking injunctions against Huawei before the International Trade Commission and U.S. courts while license negotiations were ongoing.

With respect to the FRAND rate negotiations, the court held that InterDigital: (i) had an obligation to provide licenses to the relevant SEPs on FRAND terms; and (ii) violated this obligation by demanding disproportionally excessive royalties from Huawei and requiring grant backs of Huawei patents.

The lower court awarded Huawei RMB 20 million (~$3.3 million; €2.4 million) in damages and ordered InterDigital to license its 2G, 3G, and 4G patents at a price not to exceed 0.019% of the actual sale price of the relevant Huawei products.

InterDigital appealed, but it appears the Guangdong People's High Court upheld the lower court decision in almost all aspects. InterDigital announced that it will appeal this decision to the Supreme Court in Beijing.

The high-profile litigation has also attracted the attention of the National Development and Reform Commission ("NDRC"), which opened an investigation into InterDigital's practices at the end of 2013. NDRC also launched an antitrust probe into the patent licensing practices of Qualcomm Inc., another large American holder of mobile patents, in November 2013.

First court decision regarding horizontal anti-competitive agreement

On November 21, the Intermediate Court in Beijing found that the Beijing Seafood Wholesale Industry Association (the "Association") violated the AML. One of the Association's former members, a seafood seller in Beijing, argued that the Association provided a platform for meetings and other contacts at which members discussed prices and sales volumes in violation of the AML. The court found that the policies published by the Association prohibited pricing below a certain minimum and selling certain products to non-members. The court ruled that the relevant policies constituted a price fixing agreement among members of the Association that restricts competition and is detrimental to consumers and declared the two relevant clauses void.

Although NDRC has investigated similar practices in the past, this is the first decision of a Chinese court in a private action regarding horizontal anti-competitive agreements.

MOFCOM cleared 161 merger reviews through October 2013

On December 4, the Ministry of Commerce ("MOFCOM") published its annual review for 2013. Through October 2013, MOFCOM received 185 notifications and cleared 161 of these. No transactions were prohibited. Of the cleared

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transactions, 21 cases were cleared in phase one (13%), 130 cases in phase 2 (81%), and the remaining 10 cases (6%) were cleared in phase 3. Remedies were imposed in four cases (Glencore/Xtrata, Marubeni/Gavilon, Baxter/Gambro, and Meditek/Mstar), all of which proceeded to Phase 3. The annual review also states that as compared to 2012, the average review time for a merger application has been shortened by approximately 10 days.

During the fourth quarter of 2013, MOFCOM unconditionally cleared 57 transactions.

NDRC to focus on certain industries

On December 16, NDRC announced that it will focus on the agricultural sector. Earlier in the quarter, it was reported that officials from the NDRC said that it would focus on six other sectors: aerospace, household chemicals, automobiles, telecommunications, pharmaceuticals, and home appliances. NDRC official Lu Yanchun confirmed to press that both foreign and domestic companies, as well as industry associations, may be investigated. Moreover, NDRC continues to hire additional staff in an effort to increase its capacity.

Likewise, the State Administration for Industry and Commerce ("SAIC") announced that it will focus on the insurance, telecommunications, and utilities sectors.

INDIA

Compat calculates cartel fine using "relevant turnover"

On October 29, the Indian Competition Appeals Tribunal (the "Compat") adopted its decision on the appeal by Excel Crop Care Ltd., Sandhya Organics Private Ltd., and United Phosphorus Ltd. (together the "Appellants") against a decision of the Competition Commission of India (the "CCI") alleging bid-rigging in tender offers for sale of aluminum phosphide tablets ("ALP") to, among others, the Food Commission of India ("FCI") between 2002 and 2011. The initial fines of the three appellants were Rs. 63.90 crore, (~$10.4 million; €7.5 million), Rs. 1.57 crore (~$255,000; €185,000), and Rs. 252.44 crore (~$40.9 million; €29.6 million) respectively.

In its decision the Compat rejected Appellants first two claims:

- The Compat disagreed with Appellants contention that the Director General ("DG") had exceeded its jurisdiction by investigating tenders not mentioned in the initial Information Memorandum submitted to the CCI. The Compat noted that the DG was both empowered and duty bound to look at all facts pertinent to the investigation, even those which came to light during the course of that investigation.
- The Compat also disagreed with the appellants contention that evidence of identical pricing was wrongly used by the CCI to assume the existence of a cartel. The Compat disagreed both that identical pricing was the only evidence relied on by the CCI, and with the assertion that identical pricing was insufficient in and of itself to establish a cartel, stating that identical prices over a number of years, combined with coordinated boycotts of certain FCI tenders, amounted to more than simply coincidence. The Compat also pointed out other market factors supporting a finding of collusion based on identical pricing, such as the Appellants ignoring their differing cost structures.

The Compat was more positively disposed to the third and fourth grounds for appeal:

- The Compat agreed that the CCI had not properly fulfilled its role as an adjudicatory body by failing to give reasons while imposing the penalty on the appellants. The Compat's decision went on to suggest a number of factors that the CCI should take into account when calculating penalties, namely: the financial health of the company; the necessity of the product; and the likelihood of the company being closed down on account of the penalty. The Compat further stated that the CCI should have a general regard to the proportionality of the penalty, and could take mitigating factors, such as first-time offense and the attitude of the companies, into account.

- The Compat also agreed that for multi-product companies, the "turnover" used to calculate the penalty for the offence would have to be a "relevant turnover". In coming to this conclusion, the Compat broadly agreed with the rationale expressed in the EU's Article 101 Guidelines. The Compat also held that in this case, relevant turnover meant the turnover derived from the sale of ALP by the parties, and excluded turnover accrued from the sale of non-ALP products. The Compat did not agree with the appellants' submission that the relevant turnover was only that derived from the sale of ALP to the FCI.

As a result, the penalties imposed on the two multi-product appellants were reduced to Rs. 6.94 crore (~$1.1 million; €810,000) for United Phosphorus Ltd., and Rs. 2.92 crore (~$475,000; €340,000) for Excel Corp Ltd. The penalty levied on Sandhya Organics Private Ltd was reduced to 10% of its former level, due to the small production capacity of this company.

CCI has filed an appeal of the Compat decision to the Supreme Court of India.

CCI clears Jet / Etihad combination; parties fined for gun-jumping

On November 11, the CCI approved the acquisition of a 24% equity stake in Jet Airways by Etihad. The CCI's analysis of the combination was, consistent with European airline merger analysis, based predominantly on a point of origin and point of destination ("O&D") view of the relevant market. The CCI also considered possible network effects brought about by the combination.

The relevant market was found to be international air passengers on the O&D pairs originating between the UAE and 9 cities in India, and the O&D pairs between Indian airports and other international destinations on the overlapping routes of the parties. The analysis was quite detailed. For each O&D pair, the CCI found that the transaction would not materially change competitive conditions and/or that the presence of one of more "credible competitors" (usually Air India) on the route, the substitutability of nearby airports, or alternative indirect flight options would provide sufficient competitive constraint on the parties post-combination.

As a term of the transaction, Jet is required to use Abu Dhabi as its exclusive hub for scheduled services to and from Africa, the Americas, and the UAE. This means that there will be certain O&D pairs for which Jet cannot code share with other airlines. The CCI noted in its decision that the prohibition of code sharing could lead to market foreclosure and abuse of dominance on such routes, however it concluded that the presence of strong competitors would constrain the market power of the parties.

The CCI also noted several potential benefits from the combination, including leveraging each other's areas of strength (such as Etihad's strong position within Europe) to the benefit of customers, greater pricing efficiency for passengers travelling to and from smaller Indian destinations, economies of traffic density allowing the airlines to operate more efficient aircraft and therefore to spread end point fixed costs over a larger number of passengers, the parties' intention to introduce substantial capacity into the relevant market, and the increased incentive on the parties to "harmonize and improve customer service standards" in an effort to increase brand loyalty.

In separate proceedings on December 19, the CCI fined Etihad Rs. 1 crore (~$160,000; €120,000) for completing aspects of the combination before gaining the CCI's approval. This is the 4th and largest gun-jumping fine issued by the CCI to date. The gun-jumping in question related to agreements entered into between the parties in February 2013 regarding the sale of three Jet landing slots at London Heathrow Airport to Etihad; and the lease of the same slots back to Jet, as well as the implementation of some terms of the Commercial Co-operation Agreement between the parties prior to CCI approval. The CCI noted that the Heathrow transaction was not independent of the overall deal and that, if it was, it should have been notified to the CCI in its own right.

The CCI had discretion to apply a penalty of up to 1% of total turnover or assets of the combination, but in the event settled for a fine of only Rs. 1 crore, in view of the fact that the parties had been working in good faith with the CCI to amend their agreements to its satisfaction, and had made no attempt to conceal the Heathrow transaction or other gun-jumping activities.

CCI fines state entity in abuse of dominance case

On December 9, the CCI handed down an abuse of dominance decision against Coal India Ltd. and various of its subsidiaries (together, "CIL"). The complainants alleged that due to its dominant position in the market, CIL had entered into unfair and discriminatory fuel supply agreements ("FSAs") under which it supplied coal to power generation companies and had failed in its obligations to supply specified amounts and qualities of coal to coal buyers under their FSAs.

The DG's investigation found, and the CCI subsequently confirmed, that the relevant market for investigation was the production and sale of non-coking coal to thermal power generators in India. The DG, and subsequently the CCI, concluded that by virtue of its large market share (69% in 2010-2011, and 63% in 2011-2012) and the higher price and limited utility of imported coal, CIL was dominant in the relevant market.

In its response, CIL contended that it could not be dominant because it was significantly constrained by directions received from stakeholders such as the Ministry of Power, the Ministry of Coal, and the Central Electricity Authority, the countervailing power of buyers, as evidenced in negotiations over the FSAs, and because of its inability under Indian coal regulations to freely choose its customers and the amounts supplied to those customers. CCI disagreed with this as an exculpatory argument, stating that CIL had sufficient discretion to set both coal prices and the terms and conditions of coal supply independently of government regulation. The CCI also noted that CIL's submissions on this point, if accepted, would make it impossible to find abuse of dominance in any regulated sector, which the CCI could not accept.

The CCI found no evidence of unfair or discriminatory behavior in relation to coal prices, but the DG found (and CCI agreed) that several terms of the FSAs, and actions of CIL and its subsidiaries were unfair and discriminatory. For example, terms relating to the provisions on remedies for provision of low-quality coal were found by the CCI to be discriminatory, in that the terms for new power generation companies were found to be much more stringent than those for existing power generation companies. As a result, the CCI concluded that in view of CIL's dominance in the market that CIL and its subsidiaries had violated the relevant provisions of the Competition Act 2002.

The CCI ordered that CIL cease and desist from abusive conduct; modify the FSAs in light of the findings in the decision; and pay a fine of Rs 1,773 crore (~$284 million; €210.4 million). The fine was relatively low, being set at 3% of average turnover for CIL (including its' subsidiaries' turnover) for the last three years, in recognition of the constraints placed upon CIL by government stakeholders and its attempt to modify some of the more onerous provisions of the FSAs during the investigation.

SINGAPORE

CCS doubles reward for information on competition infringements

In November, the Competition Commission of Singapore ("CCS") announced that it was doubling the maximum reward under its whistle-blower scheme from SGD 60,000 (~$47,000; €35,000) to SGD 120,000 (~$94,000; €70,000). Under this scheme, rewards may be available to any person who comes to the CCS with detailed information about potential violations of Singapore's competition law.

SOUTH KOREA

KFTC to tighten rules on fine reduction

On December 1, the Korea Fair Trade Commission (the "KFTC") announced plans to amend its rules regarding the

reduction of fines for companies accused of unfair trading practices. Currently, when analyzing potential fine reductions, the KFTC considers nine factors. Under the revised rules, the KFTC will eliminate consideration of some factors, including implementing a rigorous compliance program, and reduce the applicable fine reduction for others The KFTC also plans to impose additional fines for failure to promptly submit requested documents.

KFTC fines Denso, Continental, and Bosch for collusion

On December 23, the KFTC announced that it fined two Korean units of Japan's Denso Corporation and Germany's Continental and Bosch for fixing prices of auto parts sold to Hyundai Motor Company and its affiliate, Kia Motors. The combined fine was KRW 114.68 billion (~$107 million; €78 million). Denso received the largest penalty – KRW 63 billion (~$59 million; €43 million). After conducting an on-site investigation of these entities, together with the U.S. Department of Justice, in October, the KFTC found that Denso and Continental fixed the prices of instrument panels from January 2008 to March 2012 and that Denso and Bosch fixed the prices of wipers between August 2008 and February 2009. In addition to imposing the administrative fines, the KFTC reported the companies to the relevant South Korean Prosecutor's Office for criminal prosecution.

TAIWAN

TFTC fines companies for failure to file merger control notifications

On October 16, Taiwan's Fair Trade Commission ("TFTC") fined Taiwan's largest telecommunications services provider, Chunghwa Telecom, and newspaper group United Daily News ("UDN") TWD 1.2 million (~$40,000; €30,000) and TWD 100,000 (~$3,300; €2,400) respectively, for failure to file a pre-merger notification with the TFTC and await its clearance before closing their transaction. Chunghwa Telecom and UDN formed a joint venture named Smartfun Digital in 2011, with Chunghwa holding 65% and UND holding 35% of the company. The TFTC also found that both companies should have notified other transactions as well.

TFTC fines Apple for resale price maintenance

On December 25, the TFTC fined Apple TWD 20 million (~$660,000; €490,000) for setting restrictions on the price of iPhone contracts sold through three major telecom companies, Chunghwa Telecom, Taiwan Mobile, and Far EasTone Telecommunications. The TFTC determined that Apple had closely controlled the sale and distribution of iPhones in Taiwan by requiring vendors to seek pre-approval of retail prices and related telecom service fees and by requesting pricing and fee adjustments. The TFTC also found that Apple's contracts with the telecom vendors contained other clauses restricting sales prices.

Accordingly, TFTC concluded that Apple's distribution practices violated Taiwan's Fair Trade Act. TFTC did not find evidence of collusion among the three telecom companies or resale price maintenance in iPhones sold in Taiwan without contracts.

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