CHINA

SAIC publicizes first abuse of dominance decision

On January 6, the Guangdong branch of the State Administration for Industry and Commerce ("SAIC") published its decision and announced that it fined YiYuan Water ("YiYuan"), a state-owned water company, approximately RMB 3.2 million (~$500,000; €400,000) for abusing its dominant position. According to SAIC's findings, YiYuan held a dominant position in two districts in Guangdong province, and abused that position by requiring that real estate companies either sign agreements bundling the sale of residential water meter projects with water supply services, or sign undertakings stipulating that the real estate companies shall engage YiYuan for water meter projects in the future. The fine amounted to approximately 2 percent of YiYuan's annual sales.

MOFCOM clears Thermo Fisher/Life Technologies with conditions

On January 15, the Ministry of Commerce ("MOFCOM") announced the conditional clearance of Thermo Fisher's acquisition of Life Technologies. Despite the complexity of the transaction, MOFCOM reviewed 59 relevant product markets, MOFCOM completed its review relatively quickly (a little over 6 months after filing and 4.5 months after the filing was accepted by MOFCOM) and before the U.S. Federal Trade Commission. In addition, the decision continued MOFCOM's recent trend of providing greater detail regarding its analysis and decision making. Also consistent with past practice, MOFCOM's required remedies are somewhat different from those imposed in other jurisdictions and may reflect consideration of industrial policy concerns.

In an important development, the decision made clear that MOFCOM engaged an economic consultancy to assist in assessing the competitive effects of the transaction and disclosed certain aspects of this evaluation. The use of data intensive, sophisticated economic tools in the evaluation of a transaction's competitive effects is a positive development and a significant step in MOFCOM's effort to adopt a more empirical and analytical approach to reviewing merger cases.

As in the EU and the U.S., MOFCOM required that Thermo Fisher divest its global cell culture and gene modulation businesses. However, unlike those jurisdictions, MOFCOM also required that Thermo Fisher sell its 51% stake in a local business, and imposed two behavioral remedies: (i) over the next 10 years, lower catalog prices in China of two product categories by 1% per year, while not reducing the discounts offered to Chinese distributors; and (ii) over the next 10 years, provide third parties with those two products at the OEM terms or, in the alternative, offer a perpetual, non-exclusive technology license with respect to those two products. While it is common international practice to impose a "structural" remedy (typically a divestiture) when competitive effects are raised by a horizontal overlap, MOFCOM has preferred to impose behavioral remedies despite the associated burdens on both the parties and agency to monitor compliance.

While the combined shares in both products were not insignificant (over 40%), the incremental increase in share as a result of the transaction was not substantial. Nonetheless, MOFCOM was concerned that consumers would have fewer options.

SAIC discusses 2014 enforcement priorities

On January 22, SAIC announced its enforcement priorities for 2014. According to the report, SAIC aims to expand and strengthen its capacity to enforce the Anti-Monopoly Law and unfair competition law. It plans to focus on curbing restrictive behaviors carried out by public utilities companies in the telecommunication, public transportation, water, gas, and electricity supply sectors. SAIC also wants to enhance transparency and efficiency by making timely announcements upon the closing of investigations and by assisting and encouraging local branches of SAIC to take a

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more active role in enforcement. Further, SAIC is researching possible guidelines for its leniency program.

MOFCOM issues rules regarding "Simple" transactions

On February 12, MOFCOM's interim rules regarding "simple" concentrations (the "Interim Rules") took effect. MOFCOM has come under increasing criticism in recent years as its merger control review process often lagged behind that of other jurisdictions. In response to such criticisms and in order improve review time and more efficiently allocate resources, MOFCOM has been considering an expedited and streamlined review process for transactions that are unlikely to have an anti-competitive impact in China. The goal is to identify and handle "simple" cases more quickly so that MOFCOM's limited resources may be devoted to transactions that are more likely to have an anti-competitive impact in China.

Article 2 of the Interim Rules sets out six main categories of transactions that would be considered "simple":

- Transaction between competitors and the parties to the transaction have a combined market share of less than 15%;
- Transaction between parties in a vertical relationship (for example, a producer and distributor) and the parties' combined market share is less than 25% at either level of the relevant vertical markets;
- Transaction between parties who are not competitors in the same relevant market and do not have a vertical relationship, and the parties' respective market share is less than 25% in each market relevant to the transaction;
- Establishment of a joint venture outside of China and the joint venture does not engage in economic activities in China;
- Acquisition of an overseas entity or its assets and such overseas entity does not engage in economic activities in China; and
- Acquisition of sole control by one or more existing parents of a joint venture that was jointly controlled by two or more parents prior to the transaction.

Article 3 of the Interim Rules establishes various exceptions to the definition described above, such as (i) the relevant market is difficult to define; (ii) the transaction may adversely affect national economic development; (iii) the transaction may adversely affect consumers and other market participants; or (iv) in the opinion of MOFCOM, the transaction may adversely affect market competition.

It is not clear what level of detail will be required of parties seeking to prove that a transaction meets one or more of the categories of "simple" transaction. Notifying parties may be required to consider a range of plausible market definitions and provide detailed information supporting the proposed market definition and the relevant market shares, which could be quite burdensome. Further, the definition of "engaging in economic activity in China" is not clear and may include activities that are immaterial (e.g. a sales office with trivial turnover) and unlikely to have a material competitive in China.

Regarding the exceptions, it is unclear what may constitute an "adverse effect" on national economic development, consumers, and other markets, and whether there will be any allowance made for *de minimis* effects. There is also no guidance on what characteristics make a market difficult to define.

While the Interim Rules define a "simple" concentration, they do not establish the procedures for confirming with MOFCOM that such a designation applies to a particular transaction and do not set out the benefits of obtaining such a designation.

NDRC holds press conference

On February 19, the National Development and Reform Commission ("NDRC") held a press conference to discuss recent developments.

NDRC confirmed that it has been investigating InterDigital and Qualcomm. Both investigations were triggered by

complaints from third parties alleging abuse of dominance / discriminatory licensing fees. NDRC announced that InterDigital proposed commitments and requested that NDRC suspend its investigation. Both petitions are under review. NDRC also confirmed that it raided Qualcomm's Beijing and Shanghai offices in November 2013 and that the investigation continues. NDRC also announced an investigation into at least 43 commercial banks (including state-owned, national, municipal, and other rural banks) for imposing arbitrary banking fees.

In addition, NDRC acknowledged that while other jurisdictions were investigating price-fixing in the auto parts industry, no formal investigation had begun in China. Unofficial reports revealed that NDRC has recently started an informal antitrust inquiry of big pharmaceutical companies.

Finally, NDRC commented that it did not intend to target any particular industries in the future, but would focus on those that impact citizens' everyday lives and society as a whole.

MOFCOM holds press conference

On February 27, MOFCOM held a press conference to report on its work during 2013 and planning for 2014.

MOFCOM announced that in 2013, it received 224 notifications (an increase of 8% over the previous year), accepted 212 for review, and cleared 207. Of these, four received conditional clearance (Glencore/Xstrata, Marubeni/Gavilon, Baxter/Gambro, and Mediatek/MStar). In addition, as part of its continued effort to increase transparency, MOFCOM reported that it made available more information in its conditional clearance decisions.

MOFCOM further reported that it has been working closely with other international agencies (in particular, the European Commission and agencies in the U.S.) during its review of multinational transactions. It also has begun cooperating with Brazil, Russia, and India. Going forward, MOFCOM plans to strengthen such working relationships and enhance information sharing with international agencies.

In 2014, MOFCOM will focus on investigating transactions that meet China's merger control notification thresholds but for which filings are not made. On the legislative front, MOFCOM said that it will focus on drafting supplementary rules and guidelines regarding "simple" transactions and shall promote the introduction and implementation of the rules relating to remedies (draft rules were published in March 2013 for consultation).

MOFCOM issues notice concerning publication of its decisions regarding failure to notify

On March 20, MOFCOM announced that from May 1, 2014 it shall publicize its decisions and sanctions for failure to notify MOFCOM of transactions that meet China's merger control notification thresholds. MOFCOM announced that it has sanctioned parties for failure to notify in the past. However, MOFCOM did not make such decisions public. MOFCOM hopes that making such decisions public in the future will further increase transparency. MOFCOM also opened a telephone and fax hotline so the public may report potentially non-compliant transactions.

HONG KONG

HKCC makes appointments to two top positions

On March 21, the Hong Kong Competition Commission ("HKCC") announced the hiring of Rose Webb as Senior Executive Director (a strategic development and advisory position) and Tim Lear as Executive Director of Operations (responsible for investigating breaches of the Competition Ordinance). Both were recruited from the Australian Competition and Consumer Commission. It has been reported that the Chief Executive Officer will be announced soon.

INDIA

Commission fines BCDA for price-fixing

On March 11, the Competition Commission of India ("CCI") fined the Bengal Chemist and Druggist Association ("BCDA") and its office bearers 180 million rupees (~$3 million; €2.2 million) for anti-competitive practices. The association has approximately 34,000 members who are engaged in wholesale and retail sales of drugs in the state of West Bengal. The CCI's investigative arm, the Director General ("DG"), concluded that the BDCA had engaged in an anti-competitive practices by requiring association members to sell drugs above certain minimum retail prices ("MRP").

The BCDA argued that the MRPs are fixed for scheduled drugs by the government's Drug Price Control Order and for non-scheduled drugs by the manufacturers. However, the CCI held that the BCDA's practice of restraining retailers from offering discounts and selling below the MRP (which was enforced through picketing, the collection of fines for non-compliance, and closing of shops / directing the association's wholesale members not to supply infringing retailers) constituted an infringement of the Competition Act 2002. The CCI explained that this practice constituted "palpable anti-competitive conduct which cannot be justified" as it was detrimental to both retailers and consumers.

Google fined for lack of cooperation

On March 27, the CCI fined Google 10 million rupees (~$167,000; €121,000) for failure to comply with the directions of the DG. The DG launched its investigation on April 3, 2012. The CCI found five instances of non-compliance, including both delays and the non-submission of documents.

Google argued that the delays occurred for legitimate reasons related to the complexity and scale of the requests. Google maintained that its aim was always to provide full and complete responses but that doing so often required extensive work by employees located in different countries, departments, divisions, and roles across multiple time zones. Google also pointed to its submission of almost 10,000 pages of information in response to almost 20 notices comprising over 200 distinct questions and requests. Further, Google argued that it would be wrong to attribute the delays in the investigation solely to Google given that there were three changes in the officers responsible for the case and the investigations have continuously expanded in scope rather than become more focused.

The CCI dismissed these arguments and fined Google the maximum available under section 43 of the Competition Act for one instance of non-compliance. The CCI noted that "every failure to comply with the directions and requisitions constitutes a separate ground" for imposing penalties, but held that the "ends of justice" would be met by imposing the maximum fine for one instance of non-compliance. Nevertheless, it warned that in the case of future failures to comply with the DG's directions, each instance shall be taken separately and considered an aggravating factor for the imposition of fines.

Amendment to Combination Regulations

On March 28, the CCI amended the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("Regulations"). The main changes can be summarized as follows:

- The CCI now has the power to determine whether filing a notice is required "with regard to the substance of the transaction" and disregard any structure "that has the effect of avoiding notice." This amendment has ostensibly been introduced to discourage the structuring of transactions with the sole aim of avoiding a notification requirement. However, it is not clear how the CCI intends to utilize this provision in practice given the difficulties associated with evidencing that a particular transaction structure has been used to avoid notification (although it can be expected that internal non-privileged documents may be relevant to the analysis.)

- Previously, it was also not "normally" necessary to notify the CCI of combinations "taking place entirely outside India with insignificant local nexus and effects on markets in India". This exemption has been repealed. The CCI had rarely allowed the exemption to apply in any event.
- Pursuant to the Competition Act 2002, decisions of the CCI could be appealed to the Competition Appellate Tribunal by any aggrieved person. Prior to the amendment, the Regulations limited standing to appeal to parties to the proceedings. This limitation has now been repealed.
- In the future, Form I (or simplified) notifications must include a list of jurisdictions in which the transaction is subject to filing requirements along with certified copies of the orders passed in those jurisdictions. Form II notifications no longer need to be signed on each page of the form.
- Lastly, the filing fees have been raised significantly with respect to both Form I and II notifications. The cost of filing a Form I notification has increased from 1 million rupees (~$17,000; €12,000) to 1.5 million rupees (~$25,000; €18,000) and the Form II notification filing fee has been increased from 4 million rupees (~$67,000; €48,000) to 5 million rupees (~$83,000; €60,000).

INDONESIA

Indonesia amends competition law to add extraterritoriality

The KPPU amended Indonesia's competition law to incorporate the principle of extraterritoriality. Article 1, Clause 4 of the amendment defines businesses as companies or individuals whose business activities in or outside the country have an impact on the Indonesian economy. The KPPU sought the authority to deal with foreign companies that do not have representative offices or affiliates in Indonesia.

JAPAN

JTFC fines vehicle shippers for price fixing

On March 18, the Japan Fair Trade Commission ("JFTC") fined four vehicle shippers, Nissan MCC, Nippon Yusen Kabushiki Kaisha ("NYK"), Kawasaki Kisen Kaisha, and Wallenius Wilhelmsen Logistics, JPY 22.7 billion (~$222 million; €160 million) for fixing the price for the ocean shipment of automobiles across several global routes from 2008 to 2012. NYK received the largest fine, at JPY 13.1 billion (~$128 million; €93 million). This is the largest fine so far imposed by the JFTC on a single company for an antitrust violation. Mitsui OSK Lines received immunity from the JFTC due to its cooperation with the investigation. The investigation began in 2012 when the JFTC and European Commission raided several of the participants.

SOUTH KOREA

KFTC discusses 2014 priorities

On January 1, the Chairman of the Korea Fair Trade Commission ("KFTC") discussed the agency's priorities for 2014, and on February 20, he presented the KFTC's 2014 Business Plan to the President. Highlights include:

- Enhancing competition in innovation markets by focusing on potential abuses by patent holders and unlawful leveraging of a dominant position to capture developing industries. The KFTC also may revise its Guidelines on IPR Abuses in order to strengthen enforcement related to standard essential patents and the activities of non-practicing entities.
- Continuing its focus on cartel-related enforcement and particularly the public procurement, finance, and automobile sectors. In order to enhance its abilities in this area, the KFTC created a Bid-Rigging Investigation Division and may increase the number of personnel working in the International Cartel Division. Moreover, the KFTC plans to more frequently seek criminal charges against both corporations and individuals involved in cartel behavior. In fact, in the last year, the

KFTC has more actively pursued criminal prosecution of both companies and individuals participating in cartels, and has filed criminal complaints in almost all cartel cases. Likewise, the Prosecutor's Office has been pursuing such cases and the courts have become more aggressive, sentencing defendants to serve jail time rather than limiting the punishment to fines and suspended jail terms.

- Continuing its review of important mergers and increasing cooperation on merger control matters with foreign counterparts, particularly China and Japan. The KFTC stated that it will focus on transactions in the shipping and semiconductor industries due to their importance in the Korean economy.

KFTC fines J&J for resale price maintenance

On January 9, the KFTC fined Johnson & Johnson ("J&J") KRW 1.86 billion (~$1.8 million; €1.3 million) for engaging in resale price maintenance ("RPM"). According to the KFTC, J&J and its opticians agreed that J&J would provide a 10% discount on its Acuvue contact lenses and the opticians would not price below J&J's minimum resale price. J&J allegedly monitored compliance by sending staff to stores and suspended supply to non-compliant opticians.

KFTC amends fining guideline

Consistent with the plan described in the Asian Competition Quarterly Report for the fourth quarter of 2013,[1] on February 12, the KFTC amended its rules regarding the reduction of fines for companies accused of unfair trade practices. As expected, the amendment eliminates consideration of some mitigating factors applicable to calculation of the relevant fine, including implementing a compliance program, and reduces the fine reduction applicable to such factors (generally, from 30% to 20%). It also broadens the scope of the "repeat offender" aggravating factor and newly establishes a minimum increase of 5% to 10% of the fine based on the anti-competitive acts of the involved parties.[2] The amended rule will become effective as of August 19, 2014. Illegal conduct completed prior to this date is subject to the old rules.

Korean Supreme Court issues ruling regarding parallel conduct in cartel case

On February 13, the Supreme Court reversed a determination by the KFTC and Seoul High Court that certain Korean producers of soju (Korean distilled spirits) were fixing prices. The defendants held meetings and had other communications that were followed by parallel price increases. The defendants claimed that other factors common to the participants in the industry led to the parallel pricing. The Supreme Court declined to infer an agreement from the information exchange and parallel conduct where the parties could put forth a plausible alternative explanation for the conduct. The Supreme Court held that in such cases, the KFTC has the burden to provide additional evidence showing that there was a meeting of the minds among the defendants.

The ruling is particularly important, as existing precedent from the Seoul High Court established that information exchanges among competitors could strongly support a finding of a price-fixing agreement.

KFTC concludes Samsung's patent lawsuit against Apple was not in violation of competition law

On February 26, the KFTC closed its investigation into Apple's claim that Samsung Electronics violated competition law when it sued Apple seeking an injunction blocking Apple from selling products allegedly violating Samsung's standard essential wireless patents ("SEPs"). Samsung previously agreed to license the SEPs on fair, reasonable, and non-discriminatory ("FRAND") terms, but the KFTC found that it was questionable whether Apple negotiated in good faith. The KFTC also found that

[1] *See* http://www.cgsh.com/news/List.aspx?practice=2&geography=3.

[2] The "repeat offender" aggravating factor previously was triggered when the accused had more than three violations within three years, or five or more aggregate penalty points. Under the amendment, it applies when the offender has more than two violations within three years, or three or more aggregated penalty points.

Samsung's SEPs were not an essential input, as dozens of other companies hold thousands of patents relating to the 3G wireless standard. The latter finding is unusual as the patents held by Samsung are SEPs and thus, by definition, non-interchangeable with the patents held by other companies.

KFTC blocks Essilor's proposed acquisition of Korean lens maker

On March 17, the KFTC announced that it blocked Essilor's proposed acquisition of a 50% stake in Daemyung Optical, a privately-held Korean lens maker. Essilor is the largest manufacturer of optical lenses in both Korea and the world, and Daemyung is the second largest lens manufacturer in Korea.

The KFTC defined Korean markets for short-focus lenses and multi-focal lenses and concluded that the combined shares in these markets triggered the statutory presumption of competitive harm. The combined share in short-focus lenses was 66.3% and was 46.2% in multi-focal lenses and, in both markets, the combined share far exceeded competitors' market share (the closest competitor held an 11% market share). The KFTC also found that Daeyoung was acting as a pricing maverick and its removal would make coordination more likely.

This is the first time the KFTC has blocked a transaction since 2007 (Owens Corning/Saint-Gobain Vetrotex) and the first time it has blocked the acquisition of a Korean company by a foreign company. Interestingly, the KFTC's press release stated that the regulator wanted to "keep solid domestic firms from being acquired by foreign firms only to be relegated to the position of being their sub-contractors" in order to avoid harming the existing competitive dynamic in the marketplace and thereby "maintain the existing competitive structure".

TAIWAN

TFTC conditionally clears Microsoft's acquisition of Nokia's Devices and Services unit

On February 19, the Fair Trade Commission ("TFTC") conditionally cleared Microsoft's purchase of Nokia's Devices and Services unit. The transaction involves a vertical integration of Microsoft's Windows Phone mobile operating system with Nokia's smart phone manufacturing businesses.

Because Windows Phone possessed global and Taiwan market shares of less than 5%, the TFTC concluded that the transaction presented a low risk of exclusionary or other anti-competitive effects. However, the TFTC continued to be concerned that both companies would increase patent licensing royalties post-transaction, particularly to manufacturers of phones using the Android operating system. In addition, the TFTC was concerned that because Nokia would no longer manufacture devices, it might have altered incentives with respect to licensing related patents Therefore, the TFTC imposed two conditions. First, Microsoft must not charge unreasonable royalties or engage in discrimination for smartphone-related patents that may affect smartphone manufacturers' choice of operating systems. Second, Nokia must continue to license its standard essential patents ("SEPs") using fair, reasonable, and non-discriminatory ("FRAND") conditions. In case of transfer of these SEPs to another company, the adopting company must also adopt the use of FRAND licensing terms.

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