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CHINA

MOFCOM merger review statistics

In the third quarter of 2014, the Ministry of Commerce ("MOFCOM") unconditionally approved 48 transactions and placed conditions on the approval of one transaction (Toyota/Hunan Corun/Primearth/Changshu Sinogy JV).[1] Nearly half (22 of 48) of the unconditionally cleared transactions were notified using the new simplified procedure.

In the fourth quarter, MOFCOM unconditionally approved 75 transactions, 48 of which were notified using the simplified procedure.

Since the establishment of the rules in April, MOFCOM has accepted and published for comment 84 cases under the simplified procedure and unconditionally cleared 71 of them. Most of the cases (all but 6) were cleared within 30 days of the beginning of the public comment period (which was on or around the day MOFCOM accepted the case). The longest simplified procedure review period to date was 91 days from the beginning of the public comment period.

Supreme Court rules on Qihoo 360 vs Tencent

On October 16, the Supreme People's Court upheld the decision by the Guangdong High People's Court and dismissed Qihoo 360's abuse of dominance claims against Tencent. The Court engaged in a lengthy analysis of market definition, dominance, and the competitive impact of Tencent's alleged abuses.

Tencent provides a variety of free services, including instant messaging. Qihoo sells popular internet security software. In 2010, Tencent introduced its own internet security software and made its instant messaging service incompatible with Qihoo's security software. Qihoo sued.

The Court determined that the definition of a relevant market is a necessary step in analyzing an alleged abuse of dominance. However, the Court made clear that market definition is merely a tool used to assist in the analysis of dominance and competitive effects, and, therefore, in every case, markets need not be defined precisely. The Court noted that the traditional Hypothetical Monopolist Test is of limited utility when dealing with differentiated, free internet services that compete based on innovation, quality, service, etc. The Court analyzed the characteristics of instant messaging services and a variety of potential substitutes (text messaging, email, etc.) and noted that competition in the space was fast-paced and dynamic before concluding that the relevant market was instant messaging services in Mainland China.

While the Court found that Tencent had a market share exceeding 80%, it made clear that in order to determine whether Tencent had a dominant position, it must review other factors as well. This is interesting, as Article 19 of the Anti-Monopoly Law ("AML") states that dominance may be presumed when an entity has a market share over 50%. The Court determined that the market was characterized by low barriers to entry, robust innovation, and fickle consumers. In particular, it noted that when Tencent made Qihoo's software incompatible, MSN gained over 20 million additional instant messaging users. As a result, the Court concluded that Tencent did not have a dominant position.

Finally, when assessing the competitive effects of Tencent's alleged abuses – exclusionary conduct and bundling – the Court weighed both the procompetitive and anticompetitive impact. Interestingly, in response to Qihoo's claim that Tencent improperly bundled its instant messaging and security software, the Court determined that Tencent's proffered justification – improved functionality, quality, and service – was credible and supported its actions. The Court ultimately determined that

[1] For more information on MOFCOM's conditional clearance of the JV, please refer to Cleary Gottlieb's Asian Competition Quarterly Report for the Third Quarter of 2014, available at http://www.cgsh.com/news/List.aspx?practice=2&geography=46.

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neither the exclusionary conduct nor the bundling violated the AML.

Possible NDRC staff reshuffle

On November 21, it was officially acknowledged that Mr. Xu Kunlin, the head of the Price Supervision and Anti-Monopoly Bureau ("PSAMB") of the National Development and Reform Commission ("NDRC"), had also been appointed as the head of NDRC's Price Department.

There were rumors of this appointment after three senior Pricing Department officials responsible for pricing in the pharmaceuticals industry were put under investigation regarding suspected corruption.

It is not clear whether Mr. Xu will remain at the head of both the PSAMB and the Price Department. If a new PSAMB head is appointed, there may be changes in the bureau's enforcement style and priorities.

MOFCOM publishes rules on restrictive conditions for merger reviews for trial implementation

On December 4, MOFCOM published the Rules on Imposing Restrictive Conditions on Concentrations between Undertakings (the "Remedies Rules") for trial implementation effective January 5, 2015. MOFCOM published an interpretation of the Remedies Rules on December 17. The Remedies Rules replace MOFCOM's provisional rules enacted on July 5, 2010 and are very similar to the draft rules MOFCOM published for public consultation on March 27, 2013 (the "Draft Rules").[2] The Remedies Rules are intended to provide a comprehensive framework and general guidance for the design and implementation of merger remedies. Like the provisional rules, the focus of the Remedies Rules is divestitures.

The Remedies Rules attempt to clarify the deadline by which notifying parties must present a final remedy proposal. Instead of 20 days before the end of the "review period" as stated in the Draft Rules, the Remedies Rules specifically state that the final remedy proposal must be presented to MOFCOM 20 days before the end of the Phase II review period. (If notifying parties fail to present remedies by the deadline, MOFCOM may prohibit the concentration.) It is not clear whether "Phase II" in this provision refers to the standard 90-day Phase II or the possible 60-day extension to Phase II. It also remains to be seen how this deadline will work in practice, particularly when MOFCOM has not clearly identified its specific competition concerns to the notifying parties well in advance of this deadline. As with the Draft Rules, the Remedies Rules do not set out a timetable for MOFCOM to identify and communicate its competition concerns to the notifying parties. MOFCOM must only do so in a "timely manner".

As in other jurisdictions, MOFCOM may seek third-party comment on a proposed remedies package. However, MOFCOM has tended to provide less clarity on its processes and procedures, and it remains to be seen whether parties will be provided with feedback on the third parties approached and their comments on the remedies package.

Helpfully, like the Draft Rules, the Remedies Rules provide some detail on the characteristics and qualifications of a suitable divestiture buyer.

Also, like the Draft Rules, the Remedies Rules provide some clarity regarding the modification of remedies. However, the Remedies Rules did not resolve a major concern with the Draft Rules. It appears that MOFCOM may be able to unilaterally alter or impose stricter remedies than those agreed to by the notifying parties. In such a case, there are no clear procedural protections for the notifying parties.

In addition, the Remedies Rules provide little information regarding behavioral remedies. To date, MOFCOM has shown a preference for more complicated behavioral remedies.

The Remedies Rules reflect the input of experienced practitioners, scholars, other antitrust authorities and

[2] For more information on the 2010 provisional rules and 2013 Draft Rules, please refer to the associated alert memoranda, available at http://www.cgsh.com/news/List.aspx?practice=2&geography=46.

largely reflect remedies guidelines in the United States and the EU. For the most part, they also appear to reflect MOFCOM practice. While the Remedies Rules provide welcome clarity on a number of issues, a number of questions remain.

MOFCOM publishes penalty decisions

On December 8, MOFCOM published three administrative penalty decisions.

MOFCOM imposed a fine of RMB 300,000 (~$50,000; €40,000) on Tsinghua Unigroup for failure to notify MOFCOM of its acquisition of RDA Microelectronics, a transaction meeting the AML merger control notification thresholds. This is the first publicized penalty decision for failure to notify since MOFCOM announced in March 2014 that it would publicize such decisions.

MOFCOM also imposed two fines totaling RMB 600,000 (~$100,000; €80,000) on Western Digital for failure to comply with certain aspects of the "hold separate" merger remedy imposed when MOFCOM conditionally cleared its acquisition of Hitachi's hard disk drive business (operated by Viviti) in 2012.[3] This is MOFCOM's first published penalty decision for failure to comply with merger remedy obligations.

U.S. and China agree on AML enforcement

On December 16-18, the US-China Joint Commission on Commerce and Trade meeting took place in Chicago. The participants reached a number of agreements regarding antitrust enforcement. According to the fact sheet published by the U.S. government, China has committed to, among other things:

- Ensure fair, transparent, objective, and non-discriminatory enforcement and to treat all business operators equally;
- Provide parties under investigation with information about the agencies' concerns and provide effective opportunities for the parties to provide evidence in their defense;
- When the the AML has been violated, to impose enforcement measures that address harm to competition rather than the promotion of individual competitors or industries;
- Strictly follow statutory limits on their authority, procedures, and requirements as set out in the relevant laws and regulations;
- Notify parties of the relevant facts and the rationale and basis for its decisions before imposing penalties;
- All administrative decisions that impose liability will be provided in writing, which will also be published by the Chinese agencies; and
- Allow qualified lawyers, and where approved by the relevant regulators (which approval shall be considered using standard procedure), certain foreign lawyers, to attend and participate in meetings with the regulators.

HONG KONG

HKCC publishes draft guidelines for public consultation

On October 9, the Hong Kong Competition Commission (the "HKCC") and the Communications Authority (the "CA") jointly issued six draft guidelines (the "Draft Guidelines") for public comment, as required by the Competition Ordinance (the "Ordinance"). Three guidelines cover the HKCC's interpretation of substantive provisions of the Ordinance ("Substantive Guidelines"), and the remaining three guidelines address procedural rules ("Procedural Guidelines").

The Draft Guidelines represent the HKCC's non-binding interpretation of the Ordinance and provide valuable insight as to how the HKCC views the Ordinance. The Draft Guidelines also helpfully provide a number of examples

[3] For more information on MOFCOM's conditional clearance of the JV, please refer to Cleary Gottlieb's Asian Competition Quarterly Report for the First Quarter of 2012, available at http://www.cgsh.com/news/List.aspx?practice=2&geography=46.

illustrating potentially anticompetitive behavior under various sections of the Ordinance.

Substantive Guidelines

The Draft Guidelines confirm that the First Conduct Rule (anticompetitive agreements) will apply to both horizontal and vertical arrangements. The HKCC observed that vertical arrangements are less likely to harm competition unless the undertakings to the arrangement have some degree of market power. The Draft Guidelines, however, do not provide any indication as to what market share will be presumed to convey such power. Further, the HKCC specifically noted that resale price maintenance is presumed to violate the Ordinance (a restriction by object in the EU or *per se* violation in the U.S.). Undertakings can rebut the presumption by presenting a procompetitive justification. The Draft Guidelines also exempt agreements between undertakings that are part of a single economic entity.

The Second Conduct Rule prohibits undertakings with a substantial degree of market power from engaging in conduct that is harmful to competition. The Draft Guidelines make clear that the HKCC will assess "substantial degree of market power" on a case-by-case basis and will not use a particular market share threshold to presume dominance. The HKCC's definitions of the various conduct that may constitute an abuse – refusals to deal, predatory pricing, tying and bundling, exclusive dealing, etc. – are broadly consistent with those taken by the European Commission.

Procedural Guidelines

The Draft Guidelines provide additional detail on the filing and handling of complaints, the conduct of investigations, and the procedures for the determination of block exemptions to the Ordinance. The Draft Guidelines, however, are missing timelines for such procedures.

Analysis

The Draft Guidelines are broadly consistent with similar guidelines prepared by the EU and UK enforcement authorities. While some have criticized the Draft Guidelines for failing to provide clarity in a number of areas, HKCC officials have publicly commented that the HKCC will need more time and enforcement experience in order to provide such detail. As a result, it appears that the HKCC has consciously left some areas vague in order to retain flexibility with respect to future enforcement.

Despite such criticisms, the publication of the Draft Guidelines is an important milestone in the process of implementing the Ordinance. It also is a positive indication that HKCC endeavors to enforce the Ordinance in line with international norms.

Next Steps

The consultation period ended in December 2014. In the first half of 2015, the HKCC hopes to finalize the Draft Guidelines for consultation with and adoption by the Hong Kong Legislative Counsel.

The HKCC also hopes to publish guidelines on cartel leniency and information regarding its enforcement priorities.

The HKCC is targeting full implementation of the Ordinance in the second half of 2015.

INDIA

CCI fines Super Cassettes Industries Limited for abuse of its dominant position

On October 1, the Competition Commission of India ("CCI") imposed a fine of INR 28.3 million (~$450,000; €400,000) on Super Cassettes Industries Limited ("SCIL") for abusing a dominant position in contravention of the Competition Act 2002. The CCI's investigation was prompted by a complaint from HT Media Limited, which alleged excessive pricing and unfair terms in the licence to broadcast music belonging to SCIL.

The CCI found that SCIL had a share of 50% in the market for licensing of Bollywood music to private FM radio stations for broadcast in India, and that customers were dependent on its licences for music.

The CCI also concluded that SCIL abused its dominant position by imposing minimum commitment charges, pursuant to which radio stations were required to pay for more broadcasting than they might go on to use. This was found to amount to an "unfair condition," contrary to the Competition Act 2002.

The CCI did not find, however, that the prices charged by SCIL were excessive. It held that such a finding was impossible without detailed information about production costs. A finding of excessive pricing could not be sustained simply because the prices constitute the highest rate in the "market".

SCIL's fine equated to 8% of its average turnover for the last 3 years.

CCI approves Sun Pharma / Ranbaxy merger

On December 5, the CCI approved the proposed merger between Sun Pharma and Ranbaxy following a Phase II investigation. The approval was conditional on the divestment of (1) Sun Pharma's combined drug products Tamsulosin and Tolterdine, which are used to treat urinary tract disorders, and (2) six independent drug products marketed by Ranbaxy.

The CCI focused its investigation on 49 overlapping relevant drug markets and found no competition concerns in the majority of them. The markets where no competition concerns were found primarily were fragmented and characterised by the presence of several competitors or markets where the drugs were subject to price controls.

Competition concerns were identified in markets where the merging parties had high shares (in each case over 40% and in the case of Tamsulosin and Tolterdine, the combined share was 90-95%), supply was concentrated, and there existed significant barriers to entry.

The merger between Sun Pharma and Ranbaxy will not become effective until the divestments have been approved by the CCI and completed.

MALAYSIA

MyCC closes abuse of dominance investigation after accepting voluntary remedy

On October 8, the Malaysian Competition Commission ("MyCC") closed an abuse of dominance investigation into two shipping companies after accepting the behavioral remedies offered by the companies. The companies, Giga Shipping and Nexus Mega Carriers, ship motor vehicles from ports in the Malaysian peninsula to those in Malaysian Borneo. The companies allegedly used exclusivity language in their contracts that prevented other shippers from obtaining business. While denying any wrongdoing, in response to the MyCC investigation, the companies offered to remove any such exclusivity clauses from their contracts and implement compliance programs. MyCC accepted these commitments and closed its investigation without reaching any legal conclusion regarding liability. This is the first time MyCC has accepted behavioral remedies to settle an abuse of dominance investigation.

MyCC publishes leniency and financial penalties guidelines

On October 16, MyCC finalized and published its Guidelines on Financial Penalties ("FPG") and Guidelines on Leniency Regime ("LRG").

The FPG describe the statutory framework for the imposition of financial penalties, namely Section 17 of the Competition Commission Act 2010, and provide guidance on how MyCC will determine the amount of any financial penalty. Any penalties will reflect the seriousness of the offense, turnover in the relevant market, the duration of the infringement, the infringement's impact, recidivism, whether the investigative target is a ringleader, the level of cooperation, whether there is a compliance program, and a number of other factors. Fine levels also will be determined in an effort to deter anticompetitive practices.

The LRG also describe the statutory framework for the leniency regime and provide details regarding the relevant MyCC policies and procedures, including the types of

information MyCC expects to receive before it will grant leniency. It also makes clear that it is MyCC policy to grant a 100% fine reduction to the first successful leniency applicant unless that entity is the ringleader. In addition, the LRG allow an entity to enquire about the availability of a "marker" to establish its place in the leniency "queue" prior to its provision of evidence and explain the procedures relevant to such a marker. For the most part, the LRG are aligned with international best practices. However, applications may need to be made in writing, which, of course, generates evidence that may be available to civil litigants.

SINGAPORE

CCS conditionally clears JobStreet / SEEK Asia transaction

On November 14, the Competition Commission of Singapore ("CCS") published its decision related to the conditional approval of SEEK Asia Investments Pte. Ltd's acquisition of 100% of JobStreet Corporation Berhad, an online recruitment business. This marks the first conditional merger clearance accepted by the CCS.

CCS decided that separate markets existed for online and offline recruitment advertising due to the nature of the information available, cost, lead time, purpose, functionality, and access. The CCS also considered and rejected arguments based on the dynamic nature of the market and the competitive pressure from new entrants. As a result, the CCS determined that JobStreet and SEEK Asia were Singapore's largest online recruitment agencies and were each other's closest competitors. Therefore, the CCS concluded that the transaction may reduce competition.

To remedy these concerns, CCS accepted the following behavioral and structural commitments. For three years, SEEK Asia agreed not to (i) enter exclusive contracts with employer and recruiter customers (which gives customers flexibility and reduces entry barriers) and (ii) increase its prices except to account for inflation. SEEK Asia also agreed to divest jobs.com.sg, an aggregator of recruitment advertisements, within six months.

CCS clearance of Singapore Airlines / Tiger Airways based on failing firm defense

On November 28, CCS announced its clearance of the proposed acquisition of Tiger Airways by Singapore Airlines. The parties claimed that, absent the transaction, Tiger Airways would exit the market. After analyzing Tiger Airways' financial materials and gathering feedback from industry stakeholders, the CCS accepted this contention. The CCS then analyzed each of Tiger Airways' routes to compare the effects of the proposed transaction to an exit by Tiger Airways. The CCS ultimately concluded that the transaction would be less detrimental than Tiger Airways' exit. It is not clear from the CCS decision whether it considered the existence of any viable alternative purchaser that might result in less impact to competition. It is our understanding that this is the first time that the CCS cleared a transaction based on the "failing firm" defense.

CCS issues proposed infringement decision against 11 freight forwarders and fines 10 for price fixing

On December 11, the CCS issued an infringement decision finding that 11 freight forwarders and their Singapore subsidiaries violated the Competition Act by fixing certain fees and surcharges, as well as exchanging price and customer information on air freight services from Japan to Singapore. Ten companies were fined SGD 7.2 million (~$5.3 million; €4.7 million). DHL Global Forwarding qualified for full immunity under the CCS leniency program and was not fined. Four companies received a leniency discount (Hankyu Hanshin, Kintetsu World Express, NNR, and Vantec). The remaining parties were "K" Line Logistics, MOL Logistics, Nippon Express, Nissin, Yamato, and Yusen. In assigning the penalties, CCS took into account the nature of the infringement and each company's relevant turnover during the relevant period.

CCS acknowledged its contact and close cooperation with the Japan Fair Trade Commission and the U.S.

Department of Justice at various stages of the investigation.

SOUTH KOREA

Developments in the legal standard for evaluating information exchange and leniency statement

On October 31 and November 19, the Seoul High Court rendered a series of judgments setting aside the Korea Fair Trade Commission's ("KFTC") imposition of KRW 20.1 billion (~$18.3 million; €16.2 million) in fines against nine life insurance companies for fixing certain commission rates.

In 1998, during the Asian currency crisis, South Korea's Financial Supervisory Service ("FSS") decided to allow life insurance companies to introduce variable annuities, and required the Korea Insurance Development Institute ("KIDI") to form a task force with the insurance companies in order to discuss issues related to the introduction of these products, including the commission rates. As a result, during the subsequent meetings, which included participants from the FSS and/or KIDI, the participants exchanged information, including with regard to appropriate commission rates.

The KFTC claimed that the insurance companies used the "cover" of the legitimate task force meetings to engage in price fixing. The KFTC also filed criminal complaints with the Prosecutor's Office against five of the insurance companies.

In its ruling, the Seoul High Court cited the Supreme Court's July 24 decision holding that an exchange of information, on its own, is insufficient to establish an "agreement".[4] In support of its conclusion that the KFTC failed to adduce sufficient evidence to prove the existence of a "meeting of minds" among the insurance companies, the Seoul High Court referenced the background, purpose, nature, and participants of the task force meetings and the active administrative guidance provided by FSS regarding the establishment of commissions.

Furthermore, the Court pointed out that certain statements made by the leniency applicants were inconsistent with evidence gathered from other parties and officers from FSS and KIDI and with objectively established factual findings made by the Court. As a result, the Seoul High Court concluded that the leniency applicants may have exaggerated in order to secure their status.

As a result of the Supreme Court and Seoul High Court rulings, the KFTC must carefully weigh the veracity of evidence gathered from leniency applicants and the importance and value of evidence of information exchanges when investigating alleged cartel activity.

KFTC fines bearings producers

On November 16, the KFTC announced fines of KRW 77.8 billion (~$70.7 million; €62.5 million) against nine bearings manufacturers, including JTEKT, NSK, Fujikoshi, Schaeffler, Hanwha, and Minebea, for price fixing. NSK received full immunity under the KFTC's leniency policy.

The KFTC found that the participants colluded for 14 years to fix the prices of three types of bearings: (i) industrial bearings; (ii) small-sized bearings; and (iii) bearings sold to steel manufacturers.

We understand that this was the largest international cartel investigation ever conducted by the KFTC.

Amendment to the Leniency Notice

On November 19, the KFTC announced proposed amendments to the Notification on Mitigation or Exemption of Corrective Measures against Applicants of Improper Concerted Acts ("Leniency Notice") aimed at clarifying ambiguous provisions and improving the leniency process. On January 2, 2015, the amended Leniency Notice took effect. It applies to leniency applications filed on or after the effective date. The key features of the amended Leniency Notice are as follows.

[4] For more information, please refer to Cleary Gottlieb's Asian Competition Quarterly Report for the Third Quarter of 2014, available at http://www.cgsh.com/news/List.aspx?practice=2&geography=46.

First, the KFTC will no longer grant provisional leniency status. Previously, an applicant received provisional leniency from the KFTC Secretary General prior to the Commission's final decision on the underlying case. The Commission typically confirmed the grant of provisional leniency. In an effort to enhance cooperation, pursuant to the amended Leniency Notice, leniency status will only be determined by the Commission after its consideration of the applicant's overall status and level of cooperation.

Second, under the Leniency Notice a leniency applicant must provide evidence to prove the existence of a cartel. Previously, in order to meet this burden, an applicant could submit (i) direct evidence or (ii) narrative materials (i.e. declarations/affidavits or testimony) supported by other non-direct evidence, such as corroborating emails. In an effort to align the Leniency Notice with a recent Supreme Court decision, the KFTC will now allow narrative evidence without supporting materials if the narrative evidence sufficiently proves the relevant facts.

Lastly, the amended Leniency Notice provides additional detail on when the "second-in" applicant may obtain the benefits of leniency. In Korea, the second-in applicant may not be granted leniency benefits if (i) the cartel has only two participants; or (ii) the second-in leniency application is made more than two years after the first-in leniency application. With respect to (i), the amended Leniency Notice clarifies that whether the cartel consists of just two participants should be determined as of the cartel's end date. As for (ii), the Leniency Notice clarifies that the two year period begins to run on the day that the first-in applicant filed with the KFTC.

KFTC fines telecommunications providers for "margin squeeze"

On November 30, the KFTC announced that it fined two telecommunications providers, LG UPlus Corp. ("LG U+") and KT Corp ("KT"), for engaging in a margin squeeze related to enterprise messaging services. LG U+ was fined KRW 4.3 billion (~$4 million; €3.5 million), and KT was fined KRW 1.9 billion (~$1.7 million; €1.5 million). This is the first time the KFTC has punished a company for engaging in a "margin squeeze".

The KFTC alleged that LG U+ and KT, which own the relevant wireless networks, offered enterprise messaging services at a price below the market's average costs. The KFTC claimed that this practice prevented rivals from competing effectively regardless of how efficient they were. As a result, the companies saw their market share increase from 29% in 2006 to 71% in 2013.

In addition to the fines, the KFTC prohibited the companies from selling enterprise messaging services at prices below the sum of production-related expenses and the minimal fee charged to third parties for the use of the companies' wireless networks.

New KFTC chairman takes office

On December 8, Mr. Jae-Chan Jung began his tenure as Chairman. Mr. Jung is an experienced senior civil servant who has spent most of his professional career with the KFTC. He previously led the Cartel Bureau and served as a standing Commissioner from 2009 to 2011 and as the Vice Chairman from January 2011 to January 2014. In his inauguration speech, Mr. Jung outlined his priorities, promising to bolster monitoring of abusive behavior in the mobile industry and platform businesses and to keenly respond to international cartel and global M&A cases.

KFTC amends IPR Guidelines

On December 17, the KFTC promulgated its amended "Guidelines on the Unfair Exercise of Intellectual Property Rights" ("IPR Guidelines"), which took effect as of December 24. In its announcement, the KFTC said the amendments were made, among other reasons, to clarify what constitutes anticompetitive behavior for Non-Practicing Entities ("NPEs") and Standard of Essential Patent ("SEPs") holders by reflecting the precedent established in the U.S. and EU.

The IPR Guidelines contain a new section regarding NPEs, defining them as Enterprises Specializing in Patent Management ("ESPM"). The IPR Guidelines list five

examples of potentially abusive behavior engaged in by ESPMs: (i) imposing unreasonable royalties; (ii) refusing the application of FRAND terms that applied to the previous owner of a patent while imposing unreasonable royalties; (iii) members of a consortium making up an ESPM agreeing to refuse licenses or licensing on discriminatory terms to non-members; (iv) filing or threatening to file patent suits in an unfair manner; and (v) patent privateering.

The amended IPR Guidelines provide clarification regarding when a potential licensor of an SEP may seek an injunction. In particular, the IPR Guidelines state that an SEP holder that commits to license on FRAND terms is obligated to engage in good faith negotiations with a "willing licensee". Therefore, seeking an injunction against such a willing licensee may be deemed anticompetitive. Moreover, the IPR Guidelines provide some guidance to assist in determining whether a licensor is engaging in good-faith negotiations. They also describe a narrow set of circumstances in which an injunction is less likely to be considered anticompetitive.

The IPR Guidelines also note that a SEP holder that unreasonably evades the granting of a license on FRAND terms or imposes license conditions that unreasonably restrict licensee's exercise of related patents may have engaged in an anticompetitive act.

The IPR Guidelines make clear that holding IP does not automatically convey market power. Other market factors must be considered in order to make such a determination.

While the previous guidelines referred only to "product" and "technology" markets, the revised IPR Guidelines introduce the concept of "innovation" markets in order to ease the measurement of competitive effects on R&D. According to the IPR Guidelines, where competition in the development of new or improved products or processes is affected by the exercise of IPR, innovation markets may be considered.

Finally, the IPR Guidelines add language on (i) "Grantbacks" of improvements to licensed technology to the licensor and whether such practices constitute abusive behavior; and (ii) "Package Licensing", noting the possibility that compelling the licensing of non-SEPs with SEPs may constitute illegal tying.

TAIWAN

Taipei Administrative High Court overturns TFTC price fixing decisions

In early November, the Taipei Administrative High Court overturned two rulings of the Taiwan Fair Trade Commission ("TFTC") regarding price fixing cases.

First, the court invalidated the TFTC's TWD 6 billion (~$190.2 million; €168,2 million) fine against nine power companies.[5] The court determined that because the power companies were contractually required to sell all of their power to the Taiwan Power Company ("Taipower"), and Taipower solely determined the quantity and price of that electricity, the nine power companies were not competing in an open market for the provision of electricity. Therefore, the court concluded, the power companies could not conspire to harm competition. The fine against the power companies had been the largest ever issued by the TFTC.

The court also overturned the TFTC's fine against Toshiba-Samsung Storage Technology Korea. The TFTC fined Toshiba-Samsung Storage TWD 25 million (~$790,000; €700,000) after finding that it colluded with Hitachi-LG Data Storage Korea, Philips, and Sony Optiarc regarding an optical disk drive tender held by Dell and HP between 2006 and 2009. Toshiba-Samsung Storage was the only company to challenge the TFTC's decision. This was the TFTC's first cartel investigation involving foreign multinational companies and the application of its leniency program. The court found that the alleged actions ended in February 2009, and, therefore, the TFTC's September 19, 2012 decision came after the three-year statute of

[5] For more information, please refer to Cleary Gottlieb's Asian Competition Quarterly Report for the First Quarter of 2013, available at http://www.cgsh.com/news/List.aspx?practice=2&geography=46.

limitations for imposing administrative punishments had expired. The court also took issue with the sufficiency of the evidence against Toshiba-Samsung Storage.

Microsoft appeals TFTC's conditional clearance with Taiwan's Administrative High Court

On December 12, Microsoft filed an administrative lawsuit against the TFTC with the Taipei Administrative High Court. Microsoft seeks to overturn behavioral remedies imposed by the TFTC in its conditional clearance of Microsoft's acquisition of Nokia's Devices and Services Unit.[6] Microsoft first made an administrative appeal to the TFTC's Petitions and Appeals Committee ("PAC"). On October 8, the PAC rejected the appeal, agreeing with the TFTC that the behavioral conditions were necessary to prevent Microsoft from increasing patent royalties post-acquisition. During the PAC appeal, the TFTC also noted that overturning the behavioral conditions might put Taiwanese handset manufacturers at a disadvantage to their competitors in Mainland China, as China's MOFCOM imposed similar remedies, and Microsoft did not appeal that decision.

[6] For more information, please refer to Cleary Gottlieb's Asian Competition Quarterly Report for the First Quarter of 2014, available at http://www.cgsh.com/news/List.aspx?practice=2&geography=46.

Office Locations

NEW YORK
One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS
12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS
Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON
City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW
Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE
Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME
Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN
Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG
Cleary Gottlieb Steen & Hamilton (Hong Kong)
37th Floor, Hysan Place
500 Hennessey Road
Causeway Bay
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING
Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES
CGSH International Legal Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO
Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299

ABU DHABI
Al Sila Tower, 27th Floor
Sowwah Square, PO Box 29920
Abu Dhabi, United Arab Emirates
T: +971 2 412 1700
F: +971 2 412 1899

SEOUL
Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T:+82 2 6353 8000
F:+82 2 6353 8099