## CHINA

### SAIC publishes finalized IPR Rules

On April 7, the State Administration for Industry and Commerce ("SAIC") published the final version of the Rules on Prohibiting Abuse of Intellectual Property Rights to Eliminate or Restrict Competition ("IPR Rules"). While these are the first guidelines issued by a Chinese regulator regarding the enforcement of antitrust law in connection with the exercise of intellectual property rights ("IPR"), China's antitrust enforcement agencies have been dealing with such issues for a number of years.[1]

The final IPR Rules reflect only minor changes from the draft published last year.[2] The IPR Rules continue to state that the antitrust law and intellectual property protection share the common goal of promoting innovation and competition and protecting the rights of consumers and social and public welfare and also state that the Anti-Monopoly Law ("AML") applies only to conduct that abuses IPR and that eliminates or restricts competition. However, certain ambiguities persist.

The clauses in the IPR Rules dealing with market definition, dominance, the definitions of applicable anticompetitive activities, and relevant penalties are unsurprising and consistent with the AML and earlier guidance from China's antitrust agencies. Importantly, the IPR Rules confirm that ownership of IPR does not necessarily confer a dominant position, but is an important factor when making such a determination.

The IPR Rules introduce a safe harbor for certain anticompetitive agreements. An exercise of IPR shall not be considered a violation of Articles 13(6) or 14(3) of the AML[3] if: (i) for a horizontal agreement, the parties' combined market share does not exceed 20% or there are at least four independently held, substitutable technologies that are available at reasonable cost in the relevant market; or (ii) for vertical agreements, the respective market share of each of the parties does not exceed 30% or there are at least two independently held substitutable technologies that are available at reasonable cost in the relevant market.

The rules also state that a dominant party should not insert certain conditions in its licensing arrangements, such as exclusive grant-backs to improved technology, no-challenge clauses, or non-compete clauses.

The most controversial article of the IPR Rules is Article 7 regarding the "essential facilities" doctrine. Pursuant to Article 7, an IP owner in a dominant position conferred by that IP may not refuse to license the IP if certain conditions are met. In the earlier drafts, the rules included a non-exhaustive list of factors relevant to whether IP was essential. The final IPR Rules list three factors, each of which must be met: (i) the IP is essential for business operators to compete in the relevant market (there are no reasonable substitutes); (ii) refusal to license the IP would adversely affect competition and innovation in the relevant market; and (iii) licensing the IP would not cause unreasonable damage to the licensor. The application of the "essential facilities" doctrine in this context may create disincentives for innovation, particularly where, as here, the rules do not require that the licensee use the licensed IP to

1 For examples of the Chinese antitrust agencies' enforcement in regards to IPR, please refer to the discussion of the National Development and Reform Commission's *Qualcomm* decision in Cleary Gottlieb's Asian Competition Quarterly Report ("Asian Competition Report") for the First Quarter of 2015 and the discussion of the Ministry of Commerce's *Microsoft/Nokia* conditional clearance in the Asian Competition Report for the Second Quarter of 2014. Both are available at http://www.cgsh.com/news/List.aspx?practice=2& geography=3.

2 For additional information about last year's draft of the IPR Rules, please refer to the Asian Competition Report for the Second Quarter of 2014, available at http://www.cgsh.com/news/List.aspx?practice=2& geography=3.

3 Article 13(6) is a catch-all provision prohibiting anticompetitive horizontal agreements not otherwise defined in Article 13, and Article 14(3) is a catch-all provision prohibiting anticompetitive vertical agreements not otherwise defined in Article 14.

develop a new product rather than a copy of the existing product.

Moreover, in the context of standard setting and standard setting organizations ("SSO"), the IPR Rules may be read to prohibit a holder of a standard essential patent, which is defined broadly, from refusing to license its IPR on fair, reasonable, and nondiscriminatory ("FRAND") terms regardless of whether it has committed to do so or whether the applicable SSO requires licensing on FRAND terms.

The IPR Rules will come into effect on August 1, 2015 and apply only to enforcement by SAIC. The IPR Rules make clear that they do not apply to price-related anticompetitive behavior, which is within the jurisdiction of the National Development and Reform Commission ("NDRC").

Separately, NDRC is working on draft guidelines for the enforcement of the AML in the context of IPR. Importantly, the guidelines being prepared by the NDRC will be adopted by the State Council and, as such, will be applicable to all three antitrust enforcement agencies, including SAIC.

### Mercedes Benz fined for RPM

On April 23, the Jiangsu Price Bureau (the "Bureau"), a local branch of the NDRC, announced that it found that Mercedes Benz engaged in resale price maintenance ("RPM") for certain vehicles and spare parts. The Bureau imposed a fine of RMB 350 million (~$55 million; €50 million), equivalent to 7% of Mercedes Benz's relevant revenue in China. The local Mercedes Benz dealers also were fined RMB 7.87 million (~$1.3 million; € 1.1 million), or approximately 1% of their relevant revenue, for participating in and implementing the anticompetitive RPM arrangement. The Bureau published the full administrative sanction decision (dated April 20, 2015) on May 22, 2015.

The Bureau found that Mercedes Benz entered into RPM agreements with its dealers to fix the standard and minimum retail pricing for the E-class and S-class automobiles and car parts. The full decision, while short, provides details (location, topics of discussion, etc.) regarding meetings during which the RPM arrangement was established and discussed. Mercedes Benz enforced the agreement by requesting that dealers submit monthly sales information. If dealers did not comply, Mercedes Benz stopped supply or refused to approve the opening of new shops. In addition, Mercedes Benz requested that dealers dismiss employees who violated the RPM agreements.

Notably, the decision did not analyze any potentially procompetitive effects of the RPM arrangement. This furthers the impression established by NDRC in its earlier RPM decisions that it considers RPM, or at least minimum RPM, a *per* se violation of the AML, such that there is no need to consider potential procompetitive effects. This approach is not consistent with that taken by the Shanghai High People's Court, which, in *Rainbow v. J&J*, considered both pro- and anticompetitive effects.[4]

This decision is part of NDRC's continued probe in the auto industry that began in late 2011. Various auto makers and auto parts companies have been fined by NDRC and its provincial bureaus and additional decisions are expected.[5] This RMB 350 million fine is the largest imposed so far on the auto sector (the record was held by Sumitomo and its RMB 290.4 million fine for price fixing) and the second largest fine ever under the AML (after Qualcomm's RMB 6.1 billion fine). Moreover, no other firm found guilty of RPM has been fined as much as 7% of its relevant turnover in China.

### SAIC finds that telecom companies engaged in anticompetitive behavior

On May 14, a local branch of SAIC suspended its investigation of three state-owned telecom firms, China Unicom, China Telecomm, and China Tietong, after finding

[4] For additional information about the court's decision, please refer to the Asian Competition Report for the Third Quarter of 2013, available at http://www.cgsh.com/news/List.aspx?practice=2&geography=3.

[5] For additional information about NDRC's investigation into the auto industry, please refer to the Asian Competition Report for the Third Quarter of 2014 and an alert memorandum titled, "China's NDRC Fines Auto Parts and Bearings Companies", available at http://www.cgsh.com/news/List.aspx?practice=2&geography=3.

that each violated the AML by bundling the sale of landline telephone services with internet services. SAIC concluded that the telecom companies required that customers purchase landline telephone service before they would install broadband internet. It is not clear whether or why SAIC found the companies dominant and there are no available details regarding the alleged anticompetitive harm or any analysis of arguments made by the parties regarding procompetitive benefits.

SAIC suspended its investigation after accepting the commitments offered by the three companies, which included: (i) conducting an internal review and compliance training to deter future anticompetitive bundling; (ii) publicly announcing that customers may freely choose unbundled products and services; and (iii) allowing existing customers of the bundled package to cancel the landline telephone service. If the commitments are fulfilled by August 30, SAIC shall terminate its investigation.

### MOFCOM merger review statistics

In the second quarter, the Ministry of Commerce ("MOFCOM") unconditionally cleared 91 transactions, 61 of which were notified using the simplified procedure. No transactions were blocked or subject to conditions. This is the largest number of merger control decisions issued by MOFCOM in a single quarter.

## INDIA

### CCI amends merger control regulations

On April 1, the Competition Commission of India ("CCI") published amendments ("Proposed Amendments") to the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("Combination Regulations"). The Proposed Amendments followed consultation with stakeholders. The principal Proposed Amendments:

- Extend the current Phase I review period from 30 calendar days to 30 working days. There are also enhanced "stop the clock" powers for the CCI.
- Change one of the trigger events for notification. Previously, the trigger events were (i) the passing of board resolutions; (ii) execution of definitive documents; or (iii) any other document expressing an intent to complete an acquisition. The term "other document" had been defined in decisional practice to mean any communication of the intention to acquire to the Central or State Government. That definition has been formalized and extended to include other statutory authorities, such as the Securities and Exchange Board of India.
- Relax the requirements with respect to the authorized signatories who may verify the contents of a notification on behalf of the relevant party. The proposed change permits "any person duly authorized by the board of directors of the company for the said purpose" to sign and verify the notification.
- Provide additional clarity on the scope of confidential and public versions of submissions, limit the number of copies to be submitted, and afford discretion to the CCI to determine the form of notification in cases of failure to notify within the prescribed deadline.
- Mandate that a summary of every combination under review will be published on the website of the CCI. This will provide stakeholders with the opportunity to comment regarding the proposed combination.
- Provide additional detail on the requirements of the notification and the filing procedure (including a new Short Form template).
- Exempt from notification transactions relating to the acquisition of shares, control, voting rights, or assets by a purchaser approved by the CCI pursuant to its order directing (structural) modifications to the combination.

### CCI finds VeriFone guilty of abusing a dominant position

On April 10, the CCI found that VeriFone had abused a dominant position contrary to Section 4 of the Competition Act 2002 and imposed a fine amounting to 5% of

VeriFone's turnover for the last three financial years. The case arose from a complaint by Atos Worldwide, a licensee of VeriFone's software development kits and point of sale terminals and core terminal applications. In January 2012, VeriFone amended its licensing arrangement to (i) restrict the development of applications for use on point of sale terminals; (ii) restrict supplies; (iii) restrict the development of so-called "value added services"; and (iv) allow VeriFone to access confidential information from providers of value added services.

The CCI held that VeriFone was dominant in the supply of software development kits and point of sale terminals. It also concluded that VeriFone appeared to be enhancing its position in the downstream market by imposing restrictive clauses in the software development kits agreement and by refusing the value added service provider access to development tools on reasonable terms and conditions. The CCI identified clear consumer harm, as the restriction was said to (i) unduly limit the provision of value added services; (ii) restrict the technical and scientific development of value added services used in POS terminals in India; and (iii) act as a disincentive for Atos to continue investing in development and innovation of value added services.

### CCI closes investigation into Flipkart, Amazon, and Snapdeal

On May 5, the CCI issued a decision rejecting complaints filed against Flipkart, Snapdeal, and Amazon alleging abuse of dominance. The complaint was lodged by a user who alleged that online merchant platforms abused individually dominant positions by entering into exclusive agreements with upstream suppliers of products. As a result, the sale of that product by other e-commerce portals was prohibited and its sale was subjected to the online merchant's standard policies (*i.e.*, the sale was not subject to negotiation). The complainant submitted that each exclusive product marketed by a merchant platform constituted a separate relevant product market. His allegations were in part supported, and in part obfuscated, by the All Delhi Computer Trader Association ("ADCTA").

The complainant and the ADCTA sought, in essence, to encourage the CCI to take a form-based approach to their complaint and condemn exclusivity by allegedly dominant enterprises.

The CCI rejected that approach and made clear that the dispositive criterion for assessing whether online merchant platforms have abused a dominant position is whether their conduct has caused an appreciable adverse effect on competition in the market. The CCI explained that there was no prospect of an anticompetitive outcome in e-commerce because:

- There is intense competition in e-commerce and such competition is growing through the continued entry of new players;
- There is no individually dominant supplier in e-commerce (there are several important players with similar offerings);
- E-commerce sites represent pro-competitive, disruptive innovation for the benefit of users – they allow price comparison and avoid the time and other costs that are associated with visiting brick and mortar stores;
- Exclusive agreements with suppliers do not create entry barriers in an e-commerce context; and
- The sale of each product on an e-commerce website cannot be a separate relevant market.

The focus on effects, efficiencies, and customer benefits is aligned with the practices of more mature competition agencies.

## SOUTH KOREA

### KFTC fines two bearings companies for second time

On April 22, the Korea Fair Trade Commission ("KFTC") announced fines of KRW 7.5 billion (~$4.7 million; €4.3 million) against Schaeffler (KRW 5.5 billion) and JTEKT (KRW 2 billion) for fixing the prices of large bearings. The KFTC found that the companies colluded for eight years to fix prices and adjust production levels in order to maintain an equal share of the market.

Both companies were fined by the KFTC in November 2014 for fixing the prices of three additional types of bearings: (i) industrial bearings; (ii) small-sized bearings; and (iii) bearings sold to steel manufacturers.[6]

### KFTC fines six companies for fixing prices of portable butane gas cartridges

On May 14, the KFTC announced fines of KRW 30.9 billion (~$26.6 million; €24.1 million) against six companies for fixing the prices of portable butane gas cartridges. Taeyang (KRW 16 billion) received the largest fine. The KFTC found that the companies, which collectively serve 100% of the portable butane gas cartridge market in Korea, met at least nine times between 2007 and 2012 in order to agree on price adjustments and timing. The KFTC referred five of the companies (all but Hwasan) and executives from four of the companies (Taeyang, Maekseon, Dr. House, and Mr. Auger) to the prosecutor's office for criminal charges. The KFTC determined that the individuals directly participated in the cartel.

### KFTC reduces review time for discretionary preliminary merger control review

On June 30, the KFTC announced that it will reduce the review period from 30 days to 15 days for transactions that are voluntarily notified to the KFTC in advance for a preliminary determination regarding whether the transaction is anticompetitive. The preliminary review may be extended if the KFTC determines that the transaction is anticompetitive.

If the transaction is not deemed anticompetitive, the official notification may be made on the short form and will be subject to the simplified review process. As such, the KFTC's official review also will last 15 days (assuming that there have been no material changes since the KFTC delivered its preliminary judgment).

## TAIWAN

### Taiwan establishes fund to compensate antitrust whistleblowers

On June 9, Taiwan's legislature passed an amendment to the Fair Trade Act that would facilitate antitrust investigations by allocating 30% of fines imposed for violations of the Fair Trade Act to an antitrust fund that would reward whistleblowers who report antitrust infringements. The amendment also gives the Taiwan Fair Trade Commission ("TFTC") the power to draft procedures regarding the qualification for such financial incentives and the procedures for claiming and paying such rewards, including confidentiality, withdrawals, and cancellation. The antitrust fund also will receive funding from the government's budget and other unspecified sources. Further uses of the fund include research costs, public education regarding antitrust laws, and collaboration and information exchange between international antitrust regulators.

### Apple loses second appeal regarding TFTC RPM decision

On June 17, Apple lost its appeal at the Taipei High Administrative Court to overturn a TWD 20 million (~$650,000; €600,000) fine by the TFTC for RPM. The TFTC found that Apple interfered with contract prices for iPhones offered by local telecoms companies. The TFTC was the first antitrust regulator to penalize Apple for RPM related to the iPhone. Apple also lost an earlier appeal to Taiwan's Petitions and Appeals Committee.

[6] For additional information about the KFTC's November 2014 fine announcement, please refer to the Asian Competition Report for the Fourth Quarter of 2014, available at http://www.cgsh.com/news/List.aspx?practice=2&geography=3.

# 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)
Hysan Place, 37th Floor
500 Hennessy Road, Causeway Bay
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

**BEIJING**
Cleary Gottlieb Steen & Hamilton LLP
45th Floor, Fortune Financial Center
5 Dong San Huan Zhong Lu
Chaoyang District
Beijing 100020, 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
Abu Dhabi Global Market Square
Al Maryah Island, 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