CHINA

Developments at the intersection of antitrust and IP

All three of China's antitrust regulators are working to better understand this complex area of antitrust.

- MOFCOM

The Ministry of Commerce ("MOFCOM") has circulated a questionnaire to various concerned parties regarding the review of intellectual property ("IP") issues in the context of merger control.

- NDRC

As previously reported, the National Development and Reform Commission ("NDRC") is working on draft guidelines for enforcement of the Anti-Monopoly Law ("AML") in the context of IP rights. 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. NDRC issued a questionnaire seeking input on the appropriate scope and terms of its guidelines.

- SAIC

On July 28, the State Administration for Industry and Commerce ("SAIC") issued an interpretation of its Rules on Prohibiting Abuse of Intellectual Property Rights to Eliminate or Restrict Competition (the "IPR Rules").[1] The IPR Rules entered into force on August 1. The interpretation makes clear that possession of IP is not sufficient to confer a dominant position and that SAIC will consider a variety of factors when determining whether a company is dominant. The interpretation also emphasizes that the IPR Rules do not establish any new categories of anticompetitive conduct. Rather, SAIC will review any abuse of IP rights to determine whether it constitutes one of the abuses described in the AML. SAIC also provided some examples of anticompetitive conduct related to patent pools, such as risks associated with participation in a patent pool made up of complementary patents, the exchange of competitively sensitive information, allowing invalid or expired patents into a patent pool, and refusals to license IP.

NDRC fines Dongfeng Nissan and associated dealers for price fixing

On September 10, a provincial branch of the NDRC fined Dongfeng Nissan, a joint venture between Nissan and Dongfeng Motor Group, RMB 123 million (~$19.3 million; €18.0 million) for engaging in resale price maintenance ("RPM"). Seventeen dealerships of the joint venture were collectively fined RMB 19.1 million (~$3.0 million; €2.8 million) for price fixing.

NDRC found that from 2012 to 2014, Dongfeng Nissan and the dealers met several times to discuss and reach agreement on the price for certain vehicles. Dongfeng Nissan sought to manage its dealers' pricing and penalized dealers that did not comply with the pricing measures.

The fine on Dongfeng Nissan was 3% of its sales in the relevant market for the previous year, and the fine on the dealers amounted to 2-4% of their sales in the relevant market for the previous year.

The decision is the latest in the NDRC's continued probe of the auto industry that began in late 2011. Other auto makers and auto parts companies have been fined by NDRC and its provincial bureaus, including BMW, Chrysler, FAW-Volkswagen, and Mercedes Benz.[2]

[1] For additional information about NDRC's draft guidelines and the SAIC IPR Rules, please refer to the Asian Competition Report for the Second Quarter of 2015, available at http://www.cgsh.com/news/List.aspx? practice=2&geography=3.

[2] For additional information about NDRC's investigation of the auto industry, please refer to the Asian Competition Reports for the Third Quarter of 2014 and the Second Quarter of 2015, available at http://www.cgsh.com/news/List.aspx? practice=2&geography=3.

MOFCOM reorganization

On September 15, MOFCOM modified its case initiation process in an effort to speed up its merger review. Previously, MOFCOM's Consultation Division was responsible for accepting filings and reviewing them to determine whether they were complete. A filing was then handed to either the Legal Division or Economics Division for substantive review. Going forward, all three divisions will be responsible for both case initiation and substantive review. It is hoped that the additional staff engaging in substantive review will help speed up the overall merger control process. In addition, the change eliminates the inefficiencies associated with having separate teams conduct initiation and substantive reviews. Moreover, MOFCOM hopes to shorten the case initiation review period and may even set a time limit for this phase. In conjunction, they will more strictly enforce the requirements for complete, accurate filings.

MOFCOM fines several companies for failure to file

On September 29, MOFCOM announced fines in connection with four transactions that were completed without making the required notification to MOFCOM. In each case, MOFCOM found that the transaction would not eliminate or restrict competition.

The transactions and fines were:

- BesTV New Media/Microsoft joint venture: Both parties fined RMB 200,000 (~$31,000; €30,000) (investigation began based on third-party complaint);
- CSR Nanjing Puzhen/Bombardier joint venture: Both parties fined RMB 150,000 (~$23,000; €22,000) (parties self-reported the violation);
- Shanghai Fosun Pharmaceuticals acquisition of 35% stake in Suzhou Erye Pharmaceutical: Shanghai Fosun Pharmaceutical fined RMB 200,000 (~$31,000; €30,000) (violation uncovered when Shanghai Fosun Pharmaceutical filed to acquire remainder of target company); and
- Fujian Electronics & Information acquisition of 35% stake in Shenzhen CHINO-E Communiction: Fujian Electroncis & Information fined RMB 150,000 (~$23,000; €22,000) (investigation began based on third-party complaint).

This is the second time that MOFCOM has published penalty decisions for failure to notify. On December 8, 2014, MOFCOM announced that it fined Tsinghua Unigroup for failure to notify the acquisition of RDA Microelectronics.[3]

Earlier in September, MOFCOM Director General Shang Ming stated that MOFCOM has investigated 51 transactions for failure to notify and has penalized 17 companies in connection with 11 transactions. Interestingly, this means that MOFCOM has failed to publish information about the majority of its enforcement decisions. He also noted that MOFCOM has increased its efforts in this regard and has considered seeking an increase in the maximum penalty (RMB 500,000) in order to generate a greater deterrent effect.

MOFCOM review statistics

MOFCOM unconditionally cleared 79 transactions during the third quarter. This is 13% fewer than the second quarter. Sixty of the 79 transactions were reviewed using the simplified process, with an average review period of 28 days from acceptance of the file to clearance. This is an improvement over the second quarter's 31 day average.

HONG KONG

Enforcement of Competition Ordinance to begin December 14

On July 16, the Hong Kong government announced plans to begin enforcement of the Competition Ordinance on December 14, subject to final approval by the Legislative Council.

[3] For additional information about MOFCOM's decision, 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.

Competition Commission publishes draft leniency guidelines

On September 23, the Competition Commission ("HKCC") published the draft Cartel Leniency Policy (the "Leniency Policy"). The Leniency Policy is largely consistent with global antitrust norms.

The Leniency Policy, which applies only to competitors participating in a hard core violation of the Competition Ordinance (price fixing, bid rigging, etc.), adopts a "winner takes all" approach. In other words, the Leniency Policy provides immunity from fines for the first cartel member to report the violation, but provides no guidance on what the HKCC will recommend to the Competition Tribunal (responsible for issuing fines) for additional parties that cooperate with the HKCC's investigation. In addition, while the procedures for obtaining leniency are discussed in some detail, no specific guidance is provided regarding the type or degree of cooperation required to obtain immunity (for the first cooperator) or support for leniency (for subsequent cooperators).

The Leniency Policy establishes the following procedures. First, a leniency hotline is available for reporting violations. Applicants will receive a marker indicating the time and date of the report. Once the information is received, the HKCC will make preliminary determinations on whether the reported conduct constitutes a potential violation and whether leniency is available. Leniency will not be available if an infringement notice has already been issued or if any proceedings specific to the cartel conduct have already begun at the Competition Tribunal. If leniency is available, then the first undertaking to cooperate will be invited to apply for leniency and will have 28 days to submit additional details. The submission may be made orally. The HKCC may ask the applicant to provide some evidence in support of the proffer. Unfortunately, the draft seemingly leaves the HKCC with discretion to reject leniency even if the HKCC's requirements for obtaining leniency are met. The applicant and the HKCC may then enter into a leniency agreement pursuant to which the applicant agrees to continued cooperation and the HKCC agrees that it will not seek fines against the applicant.

Leniency will ordinarily extend to any current director, officer, or employee of the undertaking provided the relevant individuals provide complete, truthful, and continuous cooperation to the HKCC.

Interestingly, leniency applicants must be prepared to sign a statement of agreed facts and must agree to the exchange of confidential information with authorities in other jurisdictions. Both requirements could deter cooperation in Hong Kong, as parties may be concerned that confidential information will be discoverable in other jurisdictions or be shared with enforcers in other jurisdictions where the applicant does not have immunity.

Private parties may pursue separate proceedings against leniency applicants.

INDIA

CCI amends merger control regulations

The Competition Commission of India's ("CCI") amendments to the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("Revised Combination Regulations") became effective on July 1. We previously reported on the proposed amendments.[4]

Below is a description of the principal changes in the Revised Combination Regulations (most of the changes are consistent with the 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;

[4] For additional information about CCI's proposed amendments, please refer to the Asian Competition Report for the Second Quarter of 2015, available at http://www.cgsh.com/news/List.aspx? practice=2& geography=3.

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. The Revised Combination Regulations remove the obligation to file based on the communication of an intent to acquire to the Central or State Government, but such a communication to statutory authorities like the Securities and Exchange Board of India will continue to trigger the notification requirement;

- Allow CCI to invalidate a filing at any time during CCI's review for failure to provide a complete filing. While CCI will explain its rationale for invalidation, there is no need for CCI to provide parties with an opportunity to be heard or to correct any errors;
- 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 and require detailed justification and a supporting affidavit;
- 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;
- As expected, the Revised Competition Regulations provide additional detail on the requirements of the notification and the filing procedure (including a new Short Form template); and
- 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 fines automobile manufacturers for abuse of dominance

On July 27, CCI found that each of three automobile manufacturers, Hyundai, Mahindra Reva, and Premier abused their dominant position and imposed anticompetitive vertical restraints in the market for its own spare parts and repair and maintenance services. This order was a continuation of the CCI's order finding 14 additional automobile manufacturers liable for the same or similar conduct.[5] Due to applications filed by these three manufacturers, CCI afforded each additional time to provide CCI with submissions.

As before, the CCI found that the manufacturers were dominant in the secondary market for spare parts and repair services in respect of each manufacturer's vehicles. CCI explained that the manufacturers abused that dominance by restricting access to that market by independent dealers.

The remedy ordered was the same. The CCI required removal of restrictions on suppliers and distributors prohibiting the supply of spare parts to the secondary market (manufacturers are, however, able to charge a royalty where spare parts are manufactured using their intellectual property); and removal of warranty restrictions requiring customers to have their vehicles serviced only at particular outlets. Hyundai must pay a monetary penalty equal to 2% of its annual turnover averaged over the past three years. This amounts to INR 4.2 billion (~$63.6 million; €59.3 million). Due to a lack of evidence, CCI did not impose fines on Reva and Premier.

Court overturns Thomas Cook fine

On August 26, the Competition Appellate Tribunal overturned the INR 10 million (~$170,000; €125,000) gun

5 For additional information about CCI's fine against 14 car companies for abuse of a dominant position, please refer to the Asian Competition Report for the Third Quarter of 2014, available at http://www.cgsh.com/news/List.aspx? practice=2& geography=3.

jumping fine levied by the CCI on Thomas Cook on May 21, 2014.[6]

The transaction involved a multi-stage process comprising a number of acquisitions and a scheme of arrangement and amalgamation (the "Scheme"). The Parties were required to notify the Scheme to the CCI, which they did on February 14, 2014. The notification referred to February 10 and 12, 2014 acquisitions of target's shares (the "Market Purchases"). These Market Purchases were consummated before the parties filed notice of the Scheme on February 14, but the Parties believed the Market Purchases to be exempt from the notification requirements.

The CCI held that the Parties had failed to comply with the Competition Act because the various transactions amounted to a composite combination, which meant that the Market Purchases were not an isolated acquisition exempt from the obligation to notify.

The Competition Appellate Tribunal held that the Market Purchases could not be linked to the Scheme and would have fallen below the *de minimis* threshold and been exempt from notification even if they could be linked. The Competition Appellate Tribunal also found that Thomas Cook's violation was purely technical, as the company did not try to conceal the Market Purchases or obtain any advantage.

JAPAN

JFTC requests public comments on amendments to IP Guidelines

On July 8, the Japan Fair Trade Commission (the "JFTC") requested public comments on a partial amendment of the "Guidelines for the Use of Intellectual Property under the Antimonopoly Act" (the "IP Guidelines"). The IP Guidelines provide insight on JFTC enforcement of the Antimonopoly Act in the context of IP. The proposed amendment relates to the application of fair, reasonable, and non-discriminatory ("FRAND") terms and standard essential patents ("SEPs").

Standard setting organizations typically require an entity that is participating in the standard and that holds a patent that is essential to the standard to disclose the SEP and to agree to license the SEP on FRAND conditions. The current IP Guidelines do not reference licensing SEPs on FRAND terms. The proposed amendment makes it clear that certain conduct by an entity holding a FRAND-encumbered SEP, such as a refusal to license the SEP on FRAND terms or seeking an injunction against a party that is willing to take a license on FRAND terms, may be considered a violation of the Antimonopoly Act.

The JFTC will publish the final version of the revised IP Guideline after consideration of submitted comments.

PHILIPPINES

Philippines enacts landmark Competition Act

On July 21, President Benigno Aquino III signed into law the Philippine Competition Act ("PCA"). The PCA has been under consideration for 25 years. The PCA establishes the Philippine Competition Commission ("PCC"), prohibits anticompetitive agreements and abuses of a dominant market position, and regulates mergers and acquisitions. The PCC will investigate potential violations and may impose administrative penalties of up to PHP 100 million (~$2.1 million; €2 million) for the first offense and PHP 250 million (~$5.3 million; €5 million) for subsequent offenses. Pursuant to the PCA, courts may impose criminal penalties, including up to seven years imprisonment and fines of up to PHP 250 million (~$5.3 million; €5 million) for anticompetitive agreements. No penalties will be issued during the first two years of the PCA's implementation.

[6] For additional information about CCI's fine against Thomas Cook, 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.

SINGAPORE

CCS seeks feedback on proposed changes to guidelines

On September 25, the Competition Commission of Singapore ("CCS") announced the initiation of a public consultation on proposed changes to a wide variety of guidelines pursuant to which CCS will enforce the Competition Act. The following are the most important proposed changes:

- Introduction of a fast track settlement procedure for cases regarding abuse of a dominant position and anticompetitive agreements. Participating parties would have to admit guilt and would receive a 10% reduction in any financial penalty;
- Significant changes to the leniency policy, including allowing cartel ring leaders to apply for leniency and receive up to a 50% reduction in any penalty, requiring that applicants admit guilt and provide details on the anticompetitive impact of the conduct in Singapore, and a requirement that applicants grant CCS a waiver to discuss the facts of the investigation with other antitrust enforcers; and
- Proposals designed to further clarify the merger control review process by, among other things, defining "substantial lessening of competition", clarifying that vertical mergers will be handled in the same manner as horizontal mergers, and providing additional guidance on appropriate efficiency arguments.

SOUTH KOREA

KFTC approves Microsoft/Nokia transaction with conditions

On August 24, the Korea Fair Trade Commission ("KFTC") approved Microsoft's acquisition of Nokia with conditions. This transaction marks the first time the KFTC used its consent decree process to settle objections to a transaction.

As a result of the transaction, Microsoft would enter the markets for cellular devices and related services. The KFTC was concerned that Microsoft might unilaterally raise royalties or bring patent infringement lawsuits against competitors in those markets. The consent decree is designed to address that concern. The KFTC and the parties followed the process below in reaching the final consent decree:

- November 1, 2013: Microsoft and Nokia execute transaction documents;
- August 27, 2014: Microsoft proposed voluntary remedies to the KFTC;
- February 4, 2015: The KFTC found the proposed remedies insufficient. In-depth analysis of competitive concerns ensued, after which the KFTC proposed a revised consent decree;
- May 19 to June 27, 2015: The KFTC solicited public comments on the proposed remedy. None were received; and
- August 24, 2015: The KFTC approved the transaction.

The consent decree, among other things, requires Microsoft to make its SEPs available on FRAND terms, prohibits Microsoft from seeking injunctions or import bans for SEP infringements by Korean competitors, and requires Microsoft to continue to make available non-exclusive licenses under its existing patent licensing program to Korean competitors. The transaction received relatively little scrutiny in the U.S., where the FTC granted early termination on November 29, 2013.

Foreign firm indicted for first time in cartel case

In September, the Seoul Central District Prosecutor's Office indicted Japanese ball bearings company Minebea Co. Ltd. ("Minebea") for fixing prices on ball bearings sold in South Korea. The Prosecutor's Office alleges that Minebea and NSK Ltd. ("NSK") met in Japan to collude with respect to pricing. NSK avoided prosecution under the KFTC's leniency program. This case marks the Prosecutor's

Office's first indictment of a foreign firm for an international price fixing matter. The KFTC fined Minebea and NSK in November 2014 and referred the case to the Prosecutor's Office in January 2015.[7]

TAIWAN

TFTC amends Enforcement Rules

On July 2, the Taiwan Fair Trade Commission ("TFTC") announced amendments to its Enforcement Rules of the Taiwan Fair Trade Act. Key amendments include:

- Defining "control/subordinate" for the purposes of merger control as, among other things, holding more than 50% of the shares of an enterprise;
- Making clear that the ultimate parent entity of the acquirer is responsible for a merger control filing; and
- Introducing appropriate justifications for resale price maintenance, such as prevention of free riding, enhancing efficiency and quality of service of downstream enterprises, promoting entry, or promoting inter-brand competition.

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7 For additional information about the KFTC investigation and fines, 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.

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