CHINA

MOFCOM appoints new antitrust chief

On September 30, the Anti-Monopoly Bureau of the Ministry of Commerce ("MOFCOM") announced the appointment of Wu Zhengguo, a former deputy director-general, as its new director-general, effective as of August 2016. MOFCOM also added five new staff members to handle increasing workloads.

SAIC fines Tetra Pak for abuse of dominance

On November 16, after a four-year investigation, the State Administration for Industry and Commerce ("SAIC") fined Tetra Pak, a global packaging supplier, and its five Chinese affiliates RMB 667.7 million (~$97 million; €90 million) for abusing a dominant position.

SAIC defined three relevant markets: (i) paper-based aseptic packaging equipment for liquid food; (ii) services for such equipment; and (iii) paper-based aseptic packaging materials. SAIC then analyzed competitive conditions in each of these markets and determined that Tetra Pak had market power. For example, in the equipment market, SAIC found that barriers to entry were high, Tetra Pak had over a 50% share of sales, despite declining sales, Tetra Pak's margins were increasing, and that Tetra Pak had leverage with respect to pricing and other terms and conditions of sale.

SAIC then held that Tetra Pak abused its dominant position by: (i) tying sales of packaging materials to sales of equipment or services without justification; (ii) restricting upstream suppliers from trading with its competitors; and (iii) offering loyalty discounts (including retrospective aggregate discounts and individualized target discounts) to customers.

Offering loyalty discounts is not explicitly prohibited by the Anti-Monopoly Law ("AML"), though SAIC regulations do reference loyalty discounts as a potential violation. Here, SAIC decided to apply a "rule of reason" approach to the loyalty discounts. SAIC analyzed market conditions and balanced the offered procompetitive benefits (including reduced prices) against the potential anticompetitive harm.

The analytical framework described in the 47-page decision is broadly in line with U.S and European competition law. In addition, by citing economic evidence and explaining the use of economic tools for analysis, the case demonstrates the maturation of the regulator's investigations in complex abuse of dominance cases. However, SAIC continued to show a tendency towards a form-based approach, with minimal consideration of objective justifications offered by the party under investigation, in particular with regard to the tying claim.

This case marks the largest fine imposed to date by SAIC for a violation of the AML, representing 7% of Tetra Pak's revenue of the relevant product in mainland China in the previous year.

NDRC focus on resale price maintenance

In December, the National Development and Reform Commission and its local branches ("NDRC") continued to crack down on companies that engage in resale price maintenance ("RPM").

Medtronic

On December 5, NDRC imposed a fine of RMB 119 million (~$17 million; €16 million), representing 4% of Medtronic's sales of the relevant products in China in 2015. NDRC found that Medtronic infringed the AML by entering into distribution agreements with its vendors and distributors that set resale prices, net profit rates for the distributors, minimum bidding prices, and minimum sale prices to hospitals. NDRC further found that Medtronic reinforced the RPM through various means, such as reserving the right to terminate the distribution agreements and imposing monetary fines.

SAIC-GM

On December 23, the Shanghai branch of NDRC fined SAIC General Motors Corp. Ltd. ("SAIC-GM"), a joint venture between General Motors and SAIC Motor that manufactures GM-brand automobiles in China, RMB 201 million (~$29 million; €27 million), representing 4% of its relevant sales. According to NDRC's findings, SAIC-GM imposed minimum resale prices on several automobile brands through various means, including issuing regional pricing notices, setting maximum discounts, and fixing its distributors' net profit. NDRC also found that SAIC-GM hired third parties to scrutinize retail prices, closely monitored distributors' online platforms, and imposed penalties (including suspending supply of popular models, imposing fines, and reducing sales rebates) on retailers who violated its pricing policies.

Smith & Nephew

On December 29, the Shanghai branch of NDRC fined Smith & Nephew, a British medical equipment manufacturer, RMB 742,148 (~$110,000; €100,000) for setting minimum resale prices of certain over-the-counter silicone gel sheets used for scar treatment. The fine amounts to 6% of Smith & Nephew's relevant sales.

NDRC continues its focus on the medical and automotive industries. The majority of NDRC's penalty decisions in 2016 were in the medical industry.[1] Since 2014, NDRC has imposed fines for RPM on five multinational automobile manufacturers and their distributors, including Volkswagen (September 2014), Chrysler (September 2014), Mercedes (April 2015), Nissan (September 2015), and, now, General Motors.[2] It is expected that NDRC will continue to closely monitor both sectors.

MOFCOM conditionally approves Abbott's acquisition of St. Jude Medical

On December 30, MOFCOM conditionally cleared the acquisition of St. Jude Medical, Inc. ("St. Jude Medical"), a global medical device company, by Abbott Laboratories ("Abbott"), a global healthcare company. MOFCOM required that the companies divest St. Jude Medical's global vascular closure device business to Terumo Corporation ("Terumo") within 20 days of closing their transaction.

MOFCOM determined that the parties' combined share of the Chinese vascular closure device market exceeded 95% (Abbott 71.3%; St. Jude Medical 23.9%). As a result, MOFCOM concluded that the transaction would likely give rise to anticompetitive effects in this market.

MOFCOM completed its assessment of the transaction, the effectiveness of the structural remedy plan proposed by the parties, and the buyer in less than six months from the parties' initial filing. A few days prior to MOFCOM releasing its decision, the U.S. Federal Trade Commission also required the divestiture of St. Jude Medical's vascular closure device business to Terumo.

This is the third conditional approval in a row in which MOFCOM required a "fix-it-first" remedy – the transacting parties had to identify a buyer and execute a divestiture agreement prior to MOFCOM's approval of their main transaction. The other two matters were NXP/Freescale (November 2015) and Anheuser-Busch InBev/SABMiller (July 2016).

MOFCOM merger review statistics

During 2016, MOFCOM received 378 case filings, accepted 360 for review, and cleared 395 transactions, representing increases of 7.4%, 6.5%, and 19%, respectively, versus 2015. Of the cleared cases, 82% received approval during the initial 30-day waiting period, representing a 8% increase compared to 2015. Parties also are taking advantage of MOFCOM's simplified procedure for transactions less likely to raise substantive issues, with 76% of the filings reviewed using the simplified procedure,

1 For example, in July, NDRC fined three drug manufacturers for entering into and implementing anticompetitive agreements regarding a particular pharmaceutical. For more information, please refer to the Asian Competition Report for the Third Quarter of 2016, available at https://clients.clearygottlieb.com/rs/alertmemos/Asian_Competition_Report_Q3_2016.pdf.

2 For additional information about these fines, please refer to the Asian Competition Reports for the Third Quarter of 2014, Second Quarter of 2015, and Third Quarter of 2015, available at https://www.clearygottlieb.com/~/media/cgsh/files/publication-pdfs/cleary-gottlieb-asian-competition-report-2014-3rd-quarter.pdf, https://www.clearygottlieb.com/news-and-insights/publication-listing/cleary-gottlieb-asian-competition-report-q2-20156, and https://www.clearygottlieb.com/news-and-insights/publication-listing/asian-competition-report-q3-2015.

98.6% of which were cleared within 30 days from publication of the notice for public comment.

MOFCOM further reported that 53% of the cases cleared in 2016 are in the manufacturing industry, with a sharp increase in cases relating to semiconductor, telecommunications, and high-end manufacturing.

MOFCOM unconditionally cleared 92 transactions during the fourth quarter of 2016, representing a 8.2% increase compared to the third quarter. As with the previous quarter, almost all (~95%) of the cases filed using the simplified procedure were cleared within 30 days from publication of the notice for public comment.

MOFCOM also has indicated that it will continue to focus resources on identifying and investigating transactions that meet the notification thresholds but that were not filed. In 2016, MOFCOM received eight complaints regarding failure to notify, including Didi Chuxing's acquisition of Uber China and the acquisition of DreamWorks Animation by Comcast.

HONG KONG

Competition Ordinance first anniversary

December 14 marked the one-year anniversary of the full commencement of the Competition Ordinance. In its inaugural year, the Hong Kong Competition Commission ("HKCC") has engaged in a variety of work, ranging from enforcement to market study and policy advice.

HKCC enforcement activities

The HKCC has received approximately 1,900 enquiries and complaints about potentially anticompetitive practices. Over 50% of the enquiries and complaints relate to the First Conduct Rule, which prohibits agreements and concerted practices that have the object or effect of restricting competition in Hong Kong. Among those, the majority of the complaints target cartel conduct, and particularly bid-rigging. Approximately 20% of the enquiries and complaints relate to the Second Conduct Rule, which prohibits abuse of substantial market power.

The HKCC has launched around 130 initial assessments, primarily in the property and property management and professional and technical services sectors. Approximately 10% of these cases have led to the opening of in-depth investigations.

It is expected that the HKCC will bring cases to the Competition Tribunal in 2017, mainly targeting serious violations, including price-fixing and bid-rigging. HKCC Chairman Anna Wu has commented that the HKCC will possibly have no more than 2-3 court cases annually.

Draft block exemption order

On September 14, the HKCC published a draft block exemption order ("BEO") and a Statement of Preliminary Views for certain liner shipping agreements.[3] The public consultation process closed on December 14, and the HKCC is currently considering the submissions received from interested parties.

Policy advice and market study activities

The HKCC has engaged in advocacy work to raise public awareness of the new competition law. The HKCC has further provided policy advice, including on the supply of liquefied petroleum gas to public rental housing estates in September 2016 and on members of trade associations and exempt statutory bodies in November 2016. Furthermore, the HKCC published a market study on bid-rigging in the residential building renovation and maintenance market in May 2016. It is currently conducting a study on the auto-fuels market, which is expected to be published in early 2017.

International cooperation

On December 2, to enhance international cooperation, the HKCC signed a memorandum of understanding with its Canadian counterpart, the Canadian Competition Bureau. This is the first international cooperation instrument of HKCC since

[3] For additional information about the HKCC's draft block exemption order for liner shipping vessel sharing agreements, please refer to the Asian Competition Report for the Third Quarter of 2016, available at https://clients.clearygottlieb.com/rs/alertmemos/Asian_Competition_Report_Q3_2016.pdf.

the implementation of Competition Ordinance. The memorandum aims to enhance cooperation, coordination, and information sharing between the two agencies. The HKCC is expected to sign similar instruments with other overseas antitrust regulators.

INDIA

COMPAT sets aside dismissal of real estate abuse of dominance allegation

On September 28, India's Competition Appellate Tribunal ("COMPAT") overturned the Competition Commission of India's ("CCI") decision to dismiss an allegation of abuse of dominance against Jaypee Green, an upscale real estate developer, by individuals who bought apartments from it.

The purchasers alleged that Jaypee Green abused its dominance in the relevant market by making false promises about the amenities that would be made available to them and imposing unfair contractual terms on the purchasers enabling Jaypee Green to alter the construction plan unilaterally.

In November 2011, the CCI ordered the Director General ("DG"), the CCI's investigative arm, to investigate the matter. The DG's initial investigation concluded that the relevant market was the provision of services for the development and sale of residential apartments in Noida and Greater Noida and that Jaypee Green did not enjoy a position of dominance in that market. The CCI, however, considered that the DG's initial investigation was incomplete for failing to take into account certain factors and ordered the DG to investigate further.

In December 2014, the DG re-defined a relevant market for the development of integrated townships—with complementary residential, commercial, and institutional development—in Noida and Greater Noida. The DG found that Jaypee Green was dominant in that market and abused its dominance by imposing unfair and exploitative terms on the purchasers.

The majority of the CCI, however, rejected the DG's findings on the relevant market and held that the relevant product market should instead be the provision of services for the development and sale of residential apartments, in which Jaypee Green was not dominant.

On appeal, the COMPAT criticized the CCI for not giving notice to the complainants that it disagreed with the DG's findings at any stage of the proceedings until the passing of the order to dismiss the case. The COMPAT considered that this amounted to a clear violation of the basics of natural justice.

The COMPAT also considered that the CCI failed to provide cogent reasons for taking a contrary view from the DG. It, however, did not express a final view on the issue but instead remitted it back to the CCI for fresh consideration.

COMPAT rules on proper role of CCI in investigations

On November 28, the COMPAT handed down an important decision concerning the proper role of the CCI in antitrust investigations. It concluded that the CCI acted beyond the scope of its power by assuming the role of both investigator and adjudicator.

In July 2015, Gujarat Industries, a power plant operator, made an abuse of dominance allegation against GAIL, the state-owned supplier of gas in India. In September 2015, the CCI, having reviewed the relevant material and correspondence between the parties, rejected the allegation and closed the case.

On appeal, the COMPAT held that the CCI acted beyond the scope of its power. The COMPAT ruled that, under the applicable legislation, the role of the CCI upon receiving a complaint was restricted to forming a view on whether a prima facie case existed. Where a prima facie case existed, the CCI should have directed the DG to conduct an investigation and report back its findings to the CCI. Instead, in this case, the CCI launched an investigation and adjudicated on the issues itself.

The COMPAT found that Gujarat Industries succeeded in making up a prima facie case and directed the DG to conduct an investigation and report its findings to the CCI.

COMPAT remits movie studio probe again

On November 9, the COMPAT, for the second time in two years, set aside the CCI's decision not to investigate the alleged anticompetitive conduct by six major Hollywood movie studios and Digital Cinema Initiatives LLC ("Digital Cinema"), a joint venture between the studios aimed at promoting the common DCI technical specifications for digital cinema distribution for screening their films.

The case arose out of a complaint by KSS Digital Cinema ("KSS"), a digital cinema projection service provider, alleging that the Hollywood studios entered into an anticompetitive cartel in the form of Digital Cinema and sought to monopolise the market of digital cinema exhibition by forcing Indian cinemas to use only DCI-compliant digital projectors to screen Hollywood films, at the expense of KSS's and others' non-DCI compliant projectors.

In April 2015, the CCI decided not to order an investigation relying on, among other things, the Hollywood studios' claim that the DCI standards were superior and better protected their intellectual property from piracy. In December 2015, the COMPAT remitted the case back to the CCI citing, among other things, the "very significant possibility" that the imposition of technical standards could lead to foreclosure of competition.

Upon remittance, the CCI reconsidered the matter but again decided on June 8 that there was no *prima facie* case for ordering an investigation. The CCI noted that the adoption of DCI standards avoided the need for cinema owners to invest in multiple projectors for screening Hollywood films, the costs of which would be passed on to consumers.

The CCI also noted that Hollywood films constituted only a very small portion of the movie market in India, with only approximately 5% of the total revenue earned by the Indian film industry being derived from Hollywood films. The methodology used to calculate this 5% is unclear, in particular whether it related only to revenue earned from cinemas. In making this observation, the CCI also implicitly suggested that Hollywood films form part of the same market as other films, such as Bollywood films.

The CCI further placed importance on the Hollywood studios' argument that the insistence on the DCI standards were for the purpose of protecting their films from piracy.

On November 9, the COMPAT overturned the CCI's decision once again and specifically directed the CCI's DG to conduct an investigation into the allegations. The COMPAT found that the CCI erred in not adopting the "normal practice" of defining the relevant market, followed by examining the issue of dominance and likely abuse. It also criticised the CCI for relying heavily on the Hollywood studios' submissions and conducting little analysis of its own.

Finally, although the COMPAT accepted that the Hollywood studios have a right to protect their intellectual property, it stressed that any restrictions imposed for such protection must be reasonable, and the determination of what is reasonable necessarily involves fact finding.

COMPAT reverses vaccines cartel decision

On November 8, the COMPAT overturned the CCI's decision fining GlaxoSmithKline ("GSK") and Sanofi for rigging bids in tenders for meningitis vaccines by the Indian government in 2011.

Following a complaint by Bio-Med, a local supplier of meningitis vaccine, against GSK and Sanofi for coordinating their responses to bids by the Indian government, the CCI ordered the DG to launch an investigation in September 2013.

The DG concluded that GSK and Sanofi engaged in bid rigging by dividing the tendered quantity among themselves and increasing quoted prices substantially. The DG failed to provide any direct evidence of agreement but instead drew its conclusion from circumstantial evidence, including parallel increases in prices and deviation from the practice of quoting the full tendered quantity by both GSK and Sanofi. In June 2015, the CCI adopted the DG's findings, ordered GSK and Sanofi to cease and desist from engaging in collusive conduct, and imposed total fines of INR 635 million (~$10 million; ~€9 million) against them.

On appeal, the COMPAT ordered that the CCI decision and fines be set aside. The COMPAT concluded that the DG's findings "lacked objectivity," were on their face "erroneous" and "legally unsustainable," and that the CCI committed "grave error" by approving the DG's conclusions. In particular, the COMPAT found a total lack of evidence of any meeting between GSK and Sanofi, that the DG's findings contained a number of factual errors, and that the DG disregarded "cogent explanations" provided by GSK and Sanofi as to why they had given bids for limited quantities.

CCI car manufacturers cartel fine reduced

On December 9, the COMPAT reduced the fines the CCI imposed on Ford India ("Ford"), Nissan Motor India ("Nissan), and Toyota Kirloskar Motor ("Toyota") for abusing their dominance in the market for spare parts and repair and maintenance services in respect of each manufacturer's vehicles.

In August 2014, the CCI imposed a total fine of INR 25.5 billion (~$415 million; €330 million) on 14 vehicle manufacturers and ordered them to change their behavior. The CCI found that the manufacturers had abused their dominant positions and had also imposed anticompetitive vertical restraints in the relevant markets by preventing independent retailers from accessing the market.[4]

On appeal, the COMPAT affirmed the CCI's substantive findings. The COMPAT, however, found that the CCI erred in calculating the fines by reference to the manufacturers' total turnover. Rather, the COMPAT determined that the relevant turnover is that attributed to the products or services that were the subject of the anti-competitive conduct.

The COMPAT then directed that the manufacturers pay a 2% penalty on the average annual turnover attributed to the sale of spare parts in the three years preceding the CCI's investigation.

COMPAT reduces state-owned insurers' cartel fine

On December 9, the COMPAT reduced the fines the CCI imposed on state-owned insurers National Insurance Company, New India Assurance, Oriental Insurance, and United India Insurance for bid-rigging.

In July 2015, the CCI imposed a total fine of INR 6.7 billion (~$95 million; €87 million) on the four state-owned insurers for conspiring to submit artificially high cover bids in a tender conducted by the state government of Kerala to select an insurer for a national health insurance scheme.

The COMPAT, while confirming the CCI's decision on the liability of the insurers, concluded that the fines should be reduced from a rate of 2% to 1% of the insurers' average turnover of the preceding three years. In doing so, the COMPAT took account of the insurers' internal documents indicating the loss-making nature of the insurance scheme that was the subject of the tender and the fact that any penalty would likely be passed on to the public given the state-owned nature of the insurers.

COMPAT overturns dismissal of Delhi real estate abuse complaint

On December 9, the COMPAT set aside the CCI decision to dismiss an abuse of dominance complaint against DLF, a luxury real estate developer, by buyers of apartments from DLF.

The buyers alleged that DLF imposed unfair conditions in the purchase agreements against the buyers, including clauses that relieved DLF from the need to compensate the buyers for extended delays in delivering the apartments.

In August 2015, the CCI found that the relevant market was the provision of services relating to the development and sale of residential apartments in Delhi. The CCI found that DLF was not dominant in that market, noting in particular the substitutability of apartments built by the Delhi Development Authority ("DDA").

The COMPAT held that the CCI's approach in including DDA apartments in the relevant market was inconsistent with its approach in an earlier decision, where the CCI held that public sector apartments like those built by DDA were not substitutable with luxury apartments. As such, the COMPAT concluded that the CCI erred in defining the relevant market and that the relevant market should instead be the provision of services relating to development and sale of high-end luxury residential apartments in Delhi.

[4] For additional information about the CCI's 2014 decision, please refer to the Asian Competition Report for the Third Quarter of 2014, available at https://www.clearygottlieb.com/~/media/cgsh/files/publication-pdfs/cleary-gottlieb-asian-competition-report-2014-3rd-quarter.pdf.

The COMPAT did not conclude whether DLF was dominant in the narrower market and instead remitted the matter to the CCI.

INDONESIA

KPPU fines poultry breeders

On October 14, the Commission for the Supervision of Business Competition (the "KPPU") imposed a total fine of IDR 119.7 billion (~$15 million; €14 million) on 11 poultry breeders for culling two million chickens as part of an agreement to reduce supply of parent stock chickens. The KPPU exempted one participant from penalties on the basis that it had reduced its stock of chickens prior to any agreement being reached.

Three parties have filed appeals against the KPPU's decision arguing, among other things, that the cull was mandated by government regulation. Interestingly, on December 7, Indonesia's agriculture minister issued new regulations mandating the culling of chickens in order to balance supply and demand in the market, and the KPPU confirmed that the subsequent cull would be exempt from competition law.

JAPAN

JFTC conditionally approves two transactions among four major oil refiners

On December 19, the Japan Fair Trade Commission ("JFTC") conditionally approved two separate transactions in the oil industry: (i) the merger between TonenGeneral Sekiyu and JX Holdings and (ii) Idemitsu Kosan's purchase of an approximately 31% stake in Showa Shell Sekiyu. The JFTC imposed behavioral remedies on the parties to both transactions. It required that the parties sever investment ties with liquefied petroleum wholesalers or otherwise reduce ownership stakes in those petroleum wholesalers and cease information exchanges among themselves.

SINGAPORE

CCS revises enforcement guidelines

On November 1, the Competition Commission of Singapore ("CCS") published revised guidelines regarding procedures and enforcement under the Competition Act. Release of the revised guidelines followed a comprehensive review and public consultation. The revised guidelines, along with a new fast-track settlement procedure, came into effect on December 1. We examine below the new fast-track settlement procedure and consider the most significant changes and clarifications contained in the revised guidelines.

Fast-track settlement procedure

The CCS introduced a fast-track procedure ("Settlement Procedure") for the settlement of cartel, restrictive agreement, and abuse of dominance cases. Under the Settlement Procedure, in return for parties' admission of liability for the infringement (which will streamline the investigative process), CCS will grant a 10% reduction in the amount of fine.

The Settlement Procedure can be combined with an application for leniency, and a party, therefore, can combine the Settlement Procedure discount with the possible cooperation discount arising from the leniency policy.

In considering whether a case is appropriate for the Settlement Procedure, the CCS may take into account a number of factors, including the number of parties under investigation, the foreseeable divergences in the parties' positions, and the extent to which alleged facts may be contested by the parties.

The CCS will inform parties considering the Settlement Procedure of the evidence used to determine the scope of the contemplated infringement and will provide non-confidential versions of key documents that the CCS determines to be necessary to enable the party to ascertain its position. Parties will be allowed to express their views on the alleged facts, the gravity and duration of the infringement, and their respective liability.

If, at the end of the discussions between the CCS and each of the parties, the CCS concludes that procedural efficiencies are likely to be achieved with the Settlement Procedure, each party will be asked to indicate their willingness to use the Settlement Procedure by way of a submission. In its submission, a party is required to confirm that it unequivocally acknowledges its liability for the infringement and agreement to the underlying set of facts, that it has been given sufficient opportunity to be heard, and that it will not make extensive written representations, request to make oral representations, or request to inspect the evidence in the CCS's file. A settling party could, however, provide a concise memorandum identifying any material factual inaccuracies in the CCS' provisional infringement decision.

The CCS envisages that the Settlement Procedure will generally only be used if all parties under investigation agree to it. Only in exceptional circumstances, such as where a party has been ordered to be wound up, will the CCS proceed with the Settlement Procedure when the decision by the parties under investigation is not unanimous.

Guidelines on the substantive assessment of mergers

The CCS also released revised guidelines regarding its substantive review of transactions ("Merger Guidelines"). The changes to the Merger Guidelines clarify a number of procedural and substantive points and better align with the CCS' actual practice.

Perhaps most importantly, the CCS provided further guidance on its analysis of a substantial lessening of competition ("SLC") in assessing a merger. The CCS explained that the SLC test requires that it compare the extent of competition in the relevant market with and without the merger. Although there is no precise threshold as to what constitutes an SLC, the SLC threshold is more likely to be satisfied if it leads to a significant and sustainable reduction of rivalry between firms. The CCS clarified that a lessening of competition does not have to be felt across an entire market and that a lessening of competition that adversely affects a significant section of the market may be sufficient to amount to an SLC. Further, in applying the SLC test, the CCS will not only examine the competitive effects of the merger on the immediate customers of the merged entity but also its effects on subsequent, immediate, and final customers.

The Merger Guidelines also contain some discussion of the types of efficiencies and remedies that can be considered by the CCS when evaluating a transaction. The CCS considers that any efficiencies arising from a merger must be merger specific, timely, likely, and sufficient to prevent an SLC arising, and that compelling evidence must be adduced to show that any efficiency gains will lead to increased rivalry that prevents an SLC from occurring in the relevant market. Specific examples of efficiencies the CCS provided include cost reductions, removal of double mark-ups in vertical mergers, increases in investment and product range, network effects, the benefits of one-stop shopping, and innovation through the transfer of technology. The CCS noted that parties may submit remedy proposals that seek to ensure such efficiencies materialize after the merger.

The Merger Guidelines also clarify when the acquisition of a minority shareholding might confer decisive influence on the acquirer, leading to a reviewable merger. The CCS gave the example of a minority shareholder being able to achieve control over decisions made at shareholders' meeting due to the patterns of attendance and voting at such meetings and the fact that the remaining shares are widely dispersed.

Guidelines on the appropriate amount of penalty

The revised guidelines on appropriate penalty amounts ("Penalty Guidelines") make clear that the CCS has adopted a six-step approach in determining the size of a fine for anti-competitive infringements:

- Calculation of the base penalty with regard to the seriousness of the infringement and the "relevant turnover" of the business;
- Adjustment for the duration of the infringement (though the CCS will not usually make an adjustment for duration in bid-rigging or collusive tendering cases);
- Adjustment for other relevant factors, *e.g.*, deterrent value;
- Adjustment for aggravating or mitigating factors;
- Adjustment if the statutory maximum penalty (10% of the undertaking's turnover in Singapore for each year of the infringement for up to a maximum of three years) is exceeded; and
- Adjustment for immunity, leniency reductions, and/or discounts under the Settlement Procedure.

The Penalty Guidelines also provide some detail regarding the application of each step.

"Relevant turnover" for the purposes of the calculation of the base penalty is the undertaking's turnover in Singapore for the relevant markets affected by the infringement in the "undertaking's last business year." The guidelines make clear that the "undertaking's last business year" means the financial year preceding the date when the infringement ended, in accordance with the interpretation by the Competition Appeal Board ("CAB") in a recent case.[5]

The CCS rejected suggestions that it should reveal the starting point percentage range used at step one of CCS' fining methodology on the grounds that doing so would lead to the confidential relevant turnover of an addressee being reverse engineered. The CCS would, however, disclose such starting point percentage to the addressees on a confidential basis.

CCS clears Singapore Airlines/Lufthansa joint venture with commitments

On December 12, the CCS accepted voluntary commitments from Singapore Airlines and Lufthansa in clearing their proposed joint venture ("JV").

The parties notified the CCS in February of the proposed JV relating to the provision of scheduled air passenger services between certain Asian countries and certain European countries. Under the JV, the parties will cooperate with respect to pricing, sales, and marketing, as well as coordinating schedules and capacity, and sharing revenue on routes between Singapore and Munich, Dusseldorf, and Zurich.

The CCS found that the parties were the only two airlines operating direct flights to Frankfurt and Zurich from Singapore and had a combined share of over 80% on those routes. In order to alleviate the competition concerns, the parties provided voluntary commitments, including maintaining and increasing seat capacity levels on those routes, and carrying a minimum number of passengers whose point of sale for the tickets is Singapore on those routes each year.

SOUTH KOREA

KFTC fines Mitsubishi and Denso for conspiracy to fix prices

On November 1, the Korea Fair Trade Commission ("KFTC") fined Japanese companies Mitsubishi Heavy Industries Ltd. and Denso Corp. a combined KRW 11.1 billion (~$10 million; €9 million) for allegedly conspiring to fix prices on vehicle air conditioner compressors in connection with a global supply contract with General Motors. Denso has the largest global market share for scroll compressors, and Mitsubishi boasts high-end scroll compressor technology. The two companies allegedly conspired over a series of meetings in Japan and phone calls to sell compressors at above-market prices and to limit discounts. Although the conduct occurred abroad, the KFTC argued that the companies sold their price-fixed products to GM Korea, thereby affecting the Korean market, and that extraterritorial enforcement was therefore appropriate.

KFTC announces Qualcomm penalty

On December 27, the KFTC issued an administrative fine of KRW 1.03 trillion (~$875 million; €825 million) and imposed corrective orders against Qualcomm Incorporated and two subsidiaries (a patent licensing business operator and a global chipset maker) for abuse of their market dominant positions. The KFTC found Qualcomm to be a vertically integrated monopolist in the market for the licensing of standard essential patents ("SEPs") covering wireless communication standards (CDMA, WCDMA, and LTE) and in the market for modem chipsets that implement those standards. Qualcomm immediately announced its intention to appeal the order.

Citing international comity concerns, the KFTC limited the geographic scope of its corrective order to:

- handset makers headquartered in Korea;
- handset makers selling handsets in Korea;
- handset makers supplying handsets to distributors that sell in Korea;
- chipset makers headquartered in Korea; and

[5] For additional information about the CAB's decision, please refer to the Asian Competition Report for the Third Quarter of 2016, available at https://clients.clearygottlieb.com/rs/alertmemos/Asian_Competition_Report_Q3_2016.pdf.

- chipset makers supplying chipsets to the three groups of handset makers described above.

The KFTC found that Qualcomm violated FRAND licensing commitments on its SEPs and engaged in the following conduct:

Refused to grant or granted restricted licenses to competitor modem chipset makers

Qualcomm refused to grant SEP licenses to competitors such as Samsung, Intel, and Via, determining that it would be difficult to maintain a business model in which it collected royalties from handset makers if it granted exhaustive licenses to chipset makers. Qualcomm did grant a license to some competing modem chipset makers, including Mediatek, but these licenses were restricted both in the scope of customers the manufacturers could sell to and in the right of use of the modem chipsets. Because the license Qualcomm provided to its competitors was not exhaustive, any handset maker wishing to purchase a chipset from a Qualcomm competitor would have to obtain its own license from Qualcomm. The KFTC alleged that this restricted rival chipset makers' ability to effectively attract customers and enabled Qualcomm to burden handset makers' choice to purchase from rival chipset makers.

Would not supply chipsets to handset makers unless they signed a burdensome license to all of Qualcomm's wireless SEPs

According to the KFTC, Qualcomm implemented this policy by refusing to sell to handset makers until they signed a license and including provisions in its chipset supply agreements with its chipset manufacturing subsidiary that allowed it to cease supply if handset makers did not execute or perform the license agreement with its licensing subsidiary. Qualcomm used the threat of supply disruptions as leverage in negotiating the terms of its license agreements. The KFTC argued that this practice served to displace courts and other neutral venues: instead of resorting to neutral venues to decide whether to discontinue a handset maker's sales for patent infringement, Qualcomm unilaterally decided whether to discontinue a handset maker's sales. In the KFTC's view, this undermined the FRAND license's goal of preventing SEP owners from abusing the market power afforded by their SEPs.

Forced handset makers to take licenses to non-SEP patents and to supply royalty-free cross-licenses

The KFTC concluded that Qualcomm violated its FRAND commitments by: (i) forcing handset makers to buy comprehensive licenses for both its SEP and non-SEP patents when they did not want non-SEP patents; (ii) forcing handset makers to pay the same royalty rates for long or indefinite terms even as Qualcomm's technology contributions decreased; and (iii) ignoring the unique value of each handset maker's cross-license and denying handset makers fair compensation.

The KFTC did not address Qualcomm's practice of imposing royalties as a percentage of the entire device, rather than on the smallest saleable unit. This had initially been part of the KFTC's investigation.

The KFTC characterized all of the above conduct as creating an overall "unfair business model" in which each type of conduct reinforced the others. The end result, in the KFTC's view, was that Qualcomm's actions raised the costs of rival modem chipset makers, preventing them from gaining market share at Qualcomm's expense.

In assessing the impact of Qualcomm's conduct, the KFTC cited the lack of new entry and the exit of nine of 11 global modem chipset makers since 2008, despite a doubling in market size. The KFTC also cited Qualcomm's increasing share in modem chipsets.

In addition to the administrative fine, the KFTC imposed corrective orders:

- Qualcomm must engage in good-faith negotiations with modem chipset makers that request a patent license;
- Qualcomm cannot compel handset makers to enter a patent licensing agreement in order to purchase chipsets (and must remove all relevant provisions from existing agreements); and
- Qualcomm cannot compel handset manufacturers to accept unfair contractual terms, such as comprehensive licenses and compulsory royalty-free cross-licensing, and

must engage in re-negotiation of existing licenses if handset makers are willing.

Finally, the KFTC required that Qualcomm give notice to handset makers and chipset makers of the KFTC corrective orders and notify the KFTC when patent licensing agreements are amended.

KFTC amends standards for imposing administrative fines

Effective December 30, the KFTC will follow a revised set of standards for the imposition of administrative fines. The amendments are designed to clarify fining standards that were abstract, qualitative, and otherwise afforded the KFTC with too much discretion. The KFTC believes that the amendments will achieve the following:

Impose more objective calculation methods so that the fine better fits the violation

The existing standards included abstract and qualitative language that made it difficult to objectively calculate fines. The amendments revise the fine standards to reflect the realities of past KFTC enforcement data and provide details on the anticompetitive factors to be considered.

Clarify mitigating and aggravating factors

The amendments delete ambiguous concepts from listed mitigating and aggravating factors to minimize the KFTC's discretion and reduce deductions based on certain mitigating factors that the KFTC determined previously led to excessive fine reductions.

Specify the factors used to determine a violator's ability to pay

Based on case law and comments received, the KFTC will consider all applicable factors to determine a violator's ability to pay, and then adjust the fines accordingly. Factors to consider include the violator's assets, capital, debt, net profits, losses, and retained earnings.

These amendments were prepared in response to criticism that the KFTC has too much discretion in calculating fines. The KFTC hopes that the amendments make its fines more predictable and credible. Generally, it is expected that fines will increase as a result of these amendments.

TAIWAN

Amendments to merger control regime become effective

On December 2, the Taiwan Fair Trade Commission's ("TFTC") revised merger control filing thresholds under Article 11 of the Taiwan Fair Trade Act came into effect. The revision introduces a third, non-cumulative turnover threshold directed at companies with a significant global turnover and sales in Taiwan.[6] Following the amendment, a pre-closing merger filing obligation also arises where all of the parties to the combination had, in the preceding fiscal year:

- Combined global sales in excess of NTD 40 billion (~$1.3 billion; €1.2 billion); and
- Each of at least two of the parties to the combination had sales in Taiwan exceeding NTD 2 billion (~$63 million; €60 million).

The new threshold applies to any transaction with a closing date post-December 2.

In addition, on December 1, the Guideline on Extraterritorial Combinations was amended. Prior to the amendment, a foreign-to-foreign transaction was defined as "a combination of two or more foreign enterprises…where the combination will have a direct, substantial and reasonably foreseeable effect on markets in Taiwan." The guidelines made clear that if an extraterritorial transaction met this definition then it would be notifiable if it also met the relevant filing thresholds.

Pursuant to the amendment, the domestic effects requirement has been deleted from the definition of

[6] The other non-cumulative turnover thresholds remain unchanged:
(i) For non-financial enterprises, where the Taiwan sales in the preceding fiscal year of one party exceed NTD 15 billion (~$475 million; €450 million) and another party exceeds NTD 2 billion (~$63 million; €60 million); or
(ii) For financial enterprises, where the Taiwan sales in the preceding fiscal year of one party exceed NTD 30 billion (~$950 million; €900 million) and another party exceeds NTD 2 billion (~$63 million; €60 million).

foreign-to-foreign transactions. Instead, whether a transaction has domestic effects is now simply one of the factors that the TFTC will consider when determining whether to exercise jurisdiction over an extraterritorial combination. In other words, domestic effects are not a relevant consideration until after a filing has been made.

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We hope that you find the Asian Competition Quarterly Report of interest and would welcome any questions that you may have. Please reach out to your regular firm contacts or Matthew Bachrack (mbachrack@cgsh.com), Leah Brannon (lbrannon@cgsh.com), Jeremy Calsyn (jcalsyn@cgsh.com), George Cary (gcary@cgsh.com), Cunzhen Huang (chuang@cgsh.com), Nicholas Levy (nlevy@cgsh.com), Anita Ng (ang@cgsh.com), or Robbert Snelders (rsnelders@cgsh.com).

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