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Asia Pacific Competition Law Bulletin

Introduction

Welcome to the first 2017 edition of our bi-monthly Asia Pacific Competition Law Bulletin. As with our other editions, this bulletin has been produced in collaboration with expert local law firms around the region: Allens (Australia, New Zealand), Vinod Dhall in collaboration with TT&A (India), Widyawan & Partners (Indonesia), Mori Hamada & Matsumoto (Japan), Allen & Gledhill LLP (Singapore), Lee & Ko (South Korea) and Tsar & Tsai Law Firm (Taiwan). We hope this newsletter continues to be a useful source of information on antitrust developments across the Asia Pacific region.

In this edition, we outline a number of competition law and policy developments in the Asia Pacific region, with legislative reforms on competition law ongoing in Indonesia and Australia and a TPP-linked reform of voluntary resolution proceedings in Japan.

Competition authorities continue to actively enforce antitrust prohibitions, with vertical cases in Singapore and China, a report on whistleblowers in South Korea, the first ever leniency order in India and cartel cases in Australia and New Zealand.

On the merger side of things, a new merger notification threshold has been introduced in Taiwan, potentially resulting in many more mergers being notifiable to the TFTC. In China, MOFCOM fined parties to a foreign-to-foreign transaction for gun-jumping, the latest episode of China’s crackdown on merger control violations.

Finally, we look at a controversial topic: the calculation of fines under the new competition regime in Hong Kong.

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Kon Stellios, Rob Walker and Sophie Matthiesson, Allens

High Court holds that Australian cartel laws can apply to arrangements between a principal and its agents

In allowing an appeal from the Full Federal Court by the Australian Competition and Consumer Commission ("**ACCC**") in high-profile proceedings against Flight Centre, the High Court confirmed that whether a principal and agent should be treated as competitors for the purposes of the cartel laws depends on the circumstances and the nature of the relationship. In the context of that case, the High Court considered that the principal competed with the agent.

This is a landmark decision in the application of the cartel laws to distribution arrangements. ACCC Chairman Rod Sims has already commented that the decision "is likely to be particularly relevant when businesses make online sales in competition with their agents".

Flight Centre sells airline tickets as agent for a large number of airlines and receives commission on these sales. The ACCC alleged that, between 2005 and 2009, Flight Centre attempted to induce Singapore Airlines, Malaysian Airlines and Emirates to agree that any particular fare offered by the airlines directly to customers would also be made available to Flight Centre, and that the airlines would not undercut Flight Centre's prices.

In March 2016, the High Court granted the ACCC special leave to appeal the decision of the Full Federal Court, which held that Flight Centre did not compete with the airlines, but rather acted on behalf of airlines as their agent, and therefore could not be found to have contravened the prohibition on price-fixing.

In finding for the ACCC, the High Court held that the mere existence of an agency relationship at law did not mean that a principal and agent could not be characterised as competitors. Rather, the "factual reality and legal substance" of the relationship needed to be examined. The High Court considered that Flight Centre and the airlines competed with each other for the supply to customers of contractual rights to international air carriage. The following matters were relevant in reaching this conclusion:

- Flight Centre was not required to prefer the interests of the airlines above its own;
- Flight Centre was free to set its own prices when selling airline tickets; and
- Flight Centre was able to negotiate with third parties and independently determine whether to sell tickets to particular customers.

Therefore, the court held it was open to find that Flight Centre had attempted to induce the airlines to reach a price-fixing agreement, in contravention of the *Competition and Consumer Act 2010*.

In the light of this decision, suppliers should take care in managing their distribution arrangements, particularly when suppliers also supply products directly to end users (such as direct online sales). Where suppliers appoint agents, it will be important for suppliers to review those agency arrangements in the light of the High Court's decision.

Related links:

The ACCC's media release is available here.

Multi-million dollar penalties imposed on Australian banks for attempted cartel conduct in Singapore

On 14 December 2016, the Federal Court imposed multi-million dollar penalties on two Australian banks for attempted cartel conduct by their traders in Singapore in setting the benchmark rate for the Malaysian ringgit.

During the relevant period, a panel of banks was responsible for making daily submissions to the Association of Banks in Singapore in relation to the benchmark rate for the Malaysian ringgit. The daily submission related to the buy and sell rate for USD against the ringgit. Two Australian banks, ANZ and Macquarie participated in setting this benchmark standard. The rate was relevant in determining settlement payments for ringgit-denominated non-deliverable forward contracts.

Traders based in Singapore and employed by a number of banks, including ANZ and Macquarie, were alleged to have communicated in online chatrooms about daily submissions that each bank would make to the association. The ACCC brought proceedings against ANZ and Macquarie alleging that these communications constituted an attempt by them to enter into cartel conduct in contravention of the *Competition and Consumer Act 2010*.

The ACCC, ANZ and Macquarie settled the proceedings on the basis that each of ANZ and Macquarie would pay an agreed penalty. Following the filing of joint statements of facts and submissions, the Federal Court approved the settlement and imposed agreed penalties of AUD 9 million on ANZ and AUD 6 million on Macquarie.

In his judgment, Justice Wigney warned that these fines were "at the very bottom of the range" stating:

> "*Attempts by banks and other market participants to fix prices or financial benchmarks in the financial system should be regarded as particularly serious contravening conduct. It is essential that market participants and the public generally have confidence in the integrity and efficacy of the financial system…*
>
> *The Australian public is entitled to expect that Australia's major corporations act as exemplary corporate citizens wherever in the world they may operate*."

Related links:

The ACCC's media release is available here.

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Bill introduced to Parliament to broaden the misuse of market power prohibition

On 1 December 2016, the Federal Government introduced a Bill to Parliament (the *Competition and Consumer Amendment (Misuse of Market Power) Bill 2016*) to amend section 46 CCA, which prohibits the misuse of market power. The Bill adopts the recommendations of the 2015 "Competition Policy Review", commonly referred to as "the Harper Review".

The Bill repeals the current section 46, which prohibits the misuse of market power, and replaces it with a wider prohibition. The new provision will prohibit corporations with a substantial degree of power in a market from engaging in conduct which has the purpose, effect or likely effect of substantially lessening competition in that market, or any other market in which the corporation does or is likely to acquire or supply goods or services.

The key differences between the current provision and the new provision are that:

- the new provision would no longer require a causal connection between a corporation's conduct and its market power – i.e. as long as the corporation holds a substantial degree of market power, it will contravene the new prohibition if any conduct it engages has the purpose, effect or likely effect of substantially lessening competition. The new provision is therefore likely to capture significantly more conducts; and
- the current provision focusses on the purpose for which the corporation engages in the conduct. Therefore, it is only where a corporation uses its substantial market power for an anti-competitive purpose (e.g. to deter a person from entering a market or to prevent a person from engaging in competitive conduct) that the corporation will be found to have contravened the law. The new provision will, however, focus not only on purpose but also effect. Therefore, a corporation with substantial market power will contravene the new prohibition if its conduct has the effect of substantially lessening competition.

The Bill has been referred to the Senate Economics Legislation Committee, which is due to report on 16 February 2017.

Related links:

The text of the Bill and its Explanatory memorandum are available here.

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Fay Zhou and Yuan Cheng

First AML penalty in the medical device sector by the NDRC: a continuation of enforcement efforts against RPM

On 7 December 2016, the National Development and Reform Commission ("**NDRC**") handed down a fine of RMB 118.52 million (approximately USD 17.2 million) against Medtronic for engaging in resale price maintenance ("**RPM**"). The NDRC found that Medtronic had restricted resale prices and margin levels, and had set minimum bidding prices for distributors.

The Medtronic decision is remarkable for a number of reasons:

- The NDRC expressly noted that the RPM agreements included written distribution agreements, email notices and oral negotiations. This suggests that companies in their compliance efforts should look beyond written contracts, to pay attention to all aspects of day-to-day operations;
- The NDRC referred to various internal documents as evidence of both making and giving effect to RPM agreements. These included standard operation procedures on bidding which required limiting and approving distributors' bidding price, an internal employee appraisal scheme which considered compliance with RPM arrangements by distributors, and Medtronic's internal emails emphasising the importance of "managing distributors' prices";
- The NDRC paid particular attention to the specific characteristics of the medical manufacturing market (e.g. price structure, margin level of platform distributors and bidding prices of distributors). The decision provides useful guidance for companies in this sector seeking clarity on their business practices; and
- The decision is the first touching on non-price vertical restraints in the healthcare sector. The decision condemns certain customer restraints, territorial restraints and exclusive distribution arrangements. The NDRC noted that these were implemented together with RPM, and that these strengthened the anti-competitive effects of RPM. This reflects the NDRC's increasingly negative stance towards non-price vertical restrictions.

In parallel, the NDRC recently took enforcement action against RPM practices in the automotive sector (against General Motors) and in the food & beverages sector (against a Bright Food subsidiary).

In light of the continuous, evolving and strengthening antitrust enforcement against vertical restraints in China, companies are advised to (1) refrain from any RPM conduct and (2) take a more cautious approach towards non-price vertical restraints.

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MOFCOM penalises a foreign-to-foreign transaction for gun-jumping

On 4 January 2017, the Ministry of Commerce ("**MOFCOM**") sanctioned Canon for early implementation of the acquisition of all shares in Toshiba Medical System. This is the first case in which MOFCOM imposes a fine for gun jumping in relation to a foreign-to-foreign transaction.

In the *Canon/Toshiba Medical Systems* case, a distressed seller, Toshiba, agreed to sell a 100% interest in Toshiba Medical System to Cannon. The parties designed a two-step deal structure with a view for Toshiba to receive the consideration as soon as possible. Specifically, prior to the transaction, three individuals set up a special purpose entity ("**SPV**") and all outstanding shares of the target company were classified three groups: 20 Class-A shares (with voting rights); one Class-B shares (without voting rights); and 100 stock options (to acquire ordinary shares).

The transaction was scheduled to be carried out in two steps. In the first step, the SPV would sign an agreement with Toshiba to acquire the 20 Class-A shares, whilst Canon would enter into a share transfer contract with Toshiba to acquire the one Class-B share and 100 stock options. The entire purchase price for the target company would be paid to Toshiba when Canon acquired the Class-B share and 100 stock options. The second step would entail that, upon receipt of all requisite regulatory approvals (including from MOFCOM), (i) Canon would exercise the 100 stock options and convert them into ordinary shares with voting rights; (ii) the target company would buy back the Class-A and Class-B shares from the SPV and Canon and cancelled these shares. The second step would not involve any meaningful payment and Cannon would only need to pay a token amount of money to exercise the stock options. Canon notified the transaction to MOFCOM after the first step had been completed without any MOFCOM filing, but before carrying out the second step, which would give Canon full ownership of the target company.

MOFCOM considered that the two steps were closely related to each other and constituted two integral parts of one single transaction, which allowed Cannon to acquire all shares in the target company. Prior to notifying the transaction (the first step) to MOFCOM, the parties had already partially implemented the concentration by carrying out the first step. Therefore, MOFCOM considered that Cannon had engaged in an early implementation of the concentration, and imposed a fine of RMB 300,000 (with the statutory cap being RMB 500,000).

The *Canon/Toshiba Medical System* case reaffirms MOFCOM's commitment to going after breaches of filing obligations (including in foreign-to-foreign transactions). More importantly, the case raises challenges for multi-step transactions. For instance, certain arrangements such as options, trust structure and convertible debts, which are understood to not constitute a concentration of undertakings in the EU if properly devised, can nonetheless be challenged by MOFCOM as being part of a scheme to avoid or defer a China filing.

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Clara Ingen-Housz, Marcus Pollard, Alexander Lee and Knut Fournier

Calculation of fines under the Competition Ordinance

As the Hong Kong Competition Commission ("**HKCC**") prepares to bring its first enforcement cases to the Competition Tribunal ("**Tribunal**"), it is time to take stock of an important aspect of enforcement in Hong Kong: the calculation of fines.

This comes at a time where competition law authorities across the world have been imposing increasingly high fines, including in Asia. By way of illustration, the Korean competition authority imposed USD 765 million in fines in 2016 alone. In China, regulators handed down a total of USD 1.12 billion in fines in 2015, and USD 103 million in 2016.

By contrast, the pecuniary penalties to be imposed in Hong Kong enforcement proceedings are expected to be relatively limited for several reasons. First, under the Competition Ordinance ("**Ordinance**"), pecuniary penalties are capped at 10% of the undertaking's total gross revenues "obtained in Hong Kong", not world-wide. Secondly, the pecuniary penalty for a single contravention may only be imposed for up to a maximum of three years, not for the entire duration of the infringement.

In addition, the Tribunal is required to take four factors into account in setting the fine, namely:

- the nature and extent of the conduct that constitutes the contravention;
- the loss or damage caused (if any);
- the circumstance in which the conduct took place; and
- any previous contravention of the Ordinance by the same person.

Within the above limits, the Tribunal is empowered to order a pecuniary penalty of "any amount it considers appropriate".

However, further guidance on the calculation of fines currently remains limited. The current President of the Tribunal, the Hon. Mr Justice Godfrey Lam, has addressed this issue in a speech in 2015 in general terms. He noted that the Tribunal will likely make reference to practices in overseas jurisdictions as well as general sentencing principles. However, he also noted that "*[it] is not the practice of the Hong Kong courts, in general, to issue sentencing guidelines in a vacuum and outside the context of adjudication of a specific case*". Hence, it seems unlikely for the Tribunal to issue any guidance before hearing the first case.

In addition, it is unclear the extent to which the HKCC will defer to the Tribunal with respect to fine determination, and as a result refrain from making actual numerical proposals. The dynamics between the HKCC and the Tribunal will become more apparent after the first case is adjudicated.

Apart from the uncertainty over how the Tribunal will set pecuniary penalties on undertakings generally, there are two perhaps more fundamental areas of uncertainty in relation to fine calculation.

The first relates to pecuniary penalties on *individuals*, rather than companies. The Ordinance empowers the Tribunal to impose a pecuniary penalty on any "*person*" who has "*contravened or been involved in a contravention*" of the Ordinance. The address of the President of the Tribunal seems to support such a literal reading, a point which he notes "*will have great significance in terms* *of deterrence*". However, in the absence of sentencing guidelines from the Tribunal, the principles for imposing pecuniary penalties on individuals will remain uncertain. It remains to be seen whether the same principles apply to individuals and undertakings, whether a concurrent pecuniary penalty may also be imposed and whether such imposition will affect the computation of the amount of the penalty.

The second broad issue is that of *parental liability* – when a subsidiary contravenes the Ordinance, will a fine be calculated on the basis of the group-wide turnover, and will the fine be imposed on the ultimate parent entity? This will also have huge ramifications from a deterrence standpoint because this will affect the applicable turnover for purposes of the 10% cap and there may be enormous differences between the turnover of a local subsidiary and that of the wider corporate group in Hong Kong. While the HKCC seems to recognise in its guidelines the concept of a "single economic unit" under EU law, whether the Tribunal will also accept such concept, and will it use it to extend liability and financial responsibility to the parent, remains to be seen.

Given the above uncertainties, companies will continue to find it difficult to assess their potential exposure or even their compliance with the Ordinance, and such difficulties will likely continue throughout the first enforcement proceedings before the Tribunal. Without clarity on potential pecuniary penalties (both the base for calculation and the identity of the payer), companies may find it difficult to decide whether to settle cases or apply for leniency.

That said, if it is any relief to businesses in Hong Kong, the HKCC will likely face similar difficulties in enforcement. For instance, it will have to decide whether to name the subsidiary company or the parent entity as respondents in enforcement proceedings, and whether to name particular individuals involved as respondents in the same proceedings.

The HKCC has already indicated that it is preparing to lodge its first enforcement proceedings in early 2017. Whilst the Hong Kong legal community awaits the Tribunal's stance on these issues, at the very least, we will soon know more about the HKCC's approach in enforcing the Ordinance before the Tribunal.

Vinod Dhall and Avinash Amarnath, in collaboration with TT&A

CCI publishes it first ever order in leniency application

The Competition Commission of India ("**CCI**") recently published its first ever order on a leniency application. Given that leniency has become one of the favourite tools of competition authorities worldwide to detect cartel behaviour, the order provides helpful clarification on the practice of the CCI in this regard.

The CCI investigation was a referral from the Central Bureau of Investigation. The referral cited an email between Pyramid Electronics, Kanwar Electricals and Western Electric discussing quantity and rates to be quoted for various tenders. This was alleged to constitute cartel and bid-rigging activities in respect of tenders floated by Indian Railways for the procurement of Brushless DC fans in 2013.

During the investigation, Pyramid Electronics applied for leniency, admitting that it had agreed with Kanwar Electricals and Western Electric on the rates to be quoted and providing details of the role of the parties, the modus operandi and the duration of the cartel. The existence of this agreement was corroborated by call data records and actual bidding data. The CCI therefore imposed fines on Pyramid Electronics, Kanwar Electricals and Western Electric, as well as the individuals in charge of the three firms.

In consideration of Pyramid Electronics' application for leniency, the cooperation and assistance provided after such application, and the fact that the application was made after the start of the investigation, the CCI granted Pyramid Electronics a 75% penalty reduction, as opposed to a 100% reduction. It is important to note that the benefit of the leniency provision was also extended to the individual who was responsible for Pyramid Electronics' conduct.

Related files:

A copy of the order of the CCI is available here.

Yolanda Hutapea, Widyawan & Partners

Further update on the revision of Indonesia’s competition law

Indonesia’s House of Representative has tabled draft amendments to the Indonesia’s competition law as part of the 2017 prioritised legislative program.

In addition to the proposed changes previously reported in the APAC Bulletin, the new draft amendments include a number of novel proposals:

- a leniency procedure, where the KPPU can grant amnesty and/or reduce sanctions;
- a requirement that appellants pay 10% of the value of the fine imposed by the KPPU upon filing an appeal to the District Court; and
- expansion of the scope of competition law to cover “foreign individuals and foreign entities conducting activities outside Indonesia with an impact on the Indonesian economy”.

On this last point, it is uncertain how effective enforcement against foreign companies would be, especially in the absence of bilateral or multilateral agreements with foreign jurisdictions enabling the recognition and enforcement of KPPU decisions against foreign entities.

The amendments are widely expected to pass within this year, after which the executive will review the law before it enters into force.

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Kenji Ito and Aruto Kagami, Mori Hamada & Matsumoto

JFTC warns trade associations on insufficient antitrust compliance measures

On 21 December 2016, the Japan Fair Trade Commission ("**JFTC**") published on its website the results of a survey on antitrust compliance at trade associations.

The JFTC sent questionnaires to 696 trade associations across various industries and conducted hearings at 102 associations. According to the survey results, only 44.9% of the respondent associations had some antitrust compliance measures in place. The results revealed that awareness of antitrust compliance was higher at larger trade associations. However, even the largest trade associations were found to have antitrust compliance programmes in only 40% of cases.

The JFTC found that the level of antitrust compliance is generally insufficient – even among associations with some existing form of antitrust compliance measures. The regulator warned that more efforts are necessary to improve the system and prevent antitrust violations. The JFTC noted that the need for improved compliance efforts by trade associations is particularly strong today, at a time when companies' compliance standards are generally higher.

Related Links:

The outline of survey results (in English) can be found here.

The detailed report can be found here.

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Voluntary resolution mechanism to be introduced pending the Trans-Pacific Partnership's taking effect

On 9 December 2016, the National Diet passed the Act on Arrangement of Relevant Acts Incidental to Enforcement of the Trans-Pacific Partnership ("**TPP**") which introduces a new voluntary resolution mechanism for antitrust law violations. The Act provides that the JFTC will not take enforcement action if alleged infringers voluntarily submit remedies to the JFTC, and that the JFTC accepts that such remedies are sufficient to address the JFTC's concerns.

On 19 January 2017, the JFTC published on its website regulations concerning the said voluntary resolution mechanism. The regulations set forth the details of the procedures to be followed by the alleged infringers and the JFTC. For example, when submitting remedies, the alleged infringers are required to submit documentation to support the finding that the proposed plans are sufficient to address the JFTC's concerns. The JFTC will in turn determine in writing whether it accepts such plans.

The Act will only enter into force when and if the TPP enters into force in Japan.

Currently, the future of the TPP is in an extremely precarious position after U.S. President Donald Trump signed an executive withdrawing from the TPP.

Related Links:

The announcement and relevant regulations (in Japanese) can be found here.

Daren Shiau and Elsa Chen, Allen & Gledhill LLP

CCS continues to closely scrutinise vertical restraints

On 20 December 2016, the Competition Commission of Singapore ("**CCS**") was cited in an article in The Business Times as having investigated an exclusive agreement in the sporting gear industry in Singapore. The investigation was in relation to exclusive supply agreements in the retail replica football merchandising industry in Singapore pursuant to a complaint in 2014.

Following its investigation, the CCS found that the barriers to entry and/or expansion were not prohibitive for retailers in the business of selling replica football merchandise. This is on the basis that suppliers would consider on a yearly basis the retailers to be appointed for new product lists and designs to be released in the market. The CCS accordingly found that it was unlikely any retailer has the required market power to be able to prevent other retailers from competing in the market.

Vertical restraints, and exclusive agreements in particular, continue to be a focus for the CCS in its enforcement priorities. Whilst vertical restraints are excluded from the prohibition against anti-competitive agreements, they are nonetheless subject to the abuse of dominance prohibition. This is the fourth publicised investigation by the CCS into exclusive agreements in the past 18 months, and the sixth such publicised investigation by the CCS into vertical restraints since 2013.

In August 2016, the CCS announced that it had, acting on complaints, investigated an alleged anti-competitive practice by an online food delivery provider in Singapore. The investigation revealed that the online food delivery provider had entered into exclusive agreements with certain restaurants, which prevented the restaurants from using other providers' services. While the CCS ceased its investigation as competition has not been harmed at this time, the regulator stated that it will continue to closely monitor the market.

Related Links:

The CCS media release on its investigation into online food delivery industry can be found here.

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Yong Seok Ahn and Bryan Hopkins, Lee & Ko

KFTC releases information on whistle-blowers

On January 19, the Korean Fair Trade Commission ("**KFTC**") released its data on the rewards given to whistle-blowers. Unlike leniency, which is used by most of the world's antitrust regulators to encourage the reporting of cartels, rewarding whistle-blowers for reporting antitrust violations is not common.

The KFTC's reward programme for whistle-blowers has proven to be quite successful, especially in respect of cartel behaviour. Under the programme, whistle-blowers are rewarded a percentage of the amount fined and recovered by the KFTC only if the information provided by the whistle-blowers directly leads to the investigation of the suspect company or companies, as well as the levy and collection of administrative fines and penalties.

The reward system offered by the KFTC has resulted in a dramatic increase in whistle-blower activity and has proven to be an effective method of discovering cartels. In 2015, for instance, 16 whistle-blowers provided information on cartels resulting in a total award amount of KRW 799 million (approximately USD 696,000). In 2016, of the KRW 835 million (approximately USD 728,000) paid out by the KFTC to whistle-blowers, KRW 730 million (or 87.4%) were paid to whistle-blowers who reported cartels.

Summary of the data released by the KFTC:

	Whistle-blowers	Total Reward in KRW
Cartels	15	730.2 million
Unfair trade	20	38.7 million
Unfair enticements	3	39.5 million
Unfair support activities	1	24.3 million
Illegal enticement by newspapers to sell subscriptions	15	200,000
Total	54	835 million

Matt Liu and Elvin Peng, Tsar & Tsai Law Firm

New amendments to the merger filing regulations

In December 2016, the Taiwan Fair Trade Commission ("**TFTC**") amended its merger filing requirements. Key amendments include: (1) the adoption of a new turnover threshold; (2) broadening the TFTC's jurisdiction over extraterritorial mergers even where parties do not have any sales or assets in Taiwan; and (3) the imposition of the filing obligation on the ultimate controlling enterprise of the acquirers to an extraterritorial share acquisition under certain conditions.

Notification thresholds

First, the TFTC added a new turnover threshold which takes into account both the parties' global turnovers and local turnovers. The existing thresholds remain in place, and a proposed merger transaction is required to be notified to the TFTC if any of the following thresholds is triggered:

- the local turnover of one party in the previous fiscal year exceeds NTD 15 billion and that of the other exceeds NTD 2 billion (NTD 30 billion and NTD 2 billion, where all the parties are financial institutions);
- the local market share of a party in any product market amounts to 1/4 or more; or
- one party to the acquisition will acquire a local market share of at least 1/3 in any product market, as a result of the transaction.

Under the amendment, in addition to the above three thresholds, a filing will also be triggered if all the parties' combined global turnover exceeds NTD 40 billion and at least two parties' local turnover exceeds NTD 2 billion in the previous fiscal year.

Extraterritorial jurisdiction

Secondly, the TFTC now may decide whether or not to exercise its jurisdiction over an extraterritorial merger by considering certain factors, including the fact that the parties do not have any manufacturing or service facilities, distributors, agents or other substantive sales channels in Taiwan. Before the amendment, if the parties did not have any manufacturing or service facilities, distributors, agents or other substantive sales channels in Taiwan, the TFTC would not exercise its jurisdiction over the proposed transaction. Under the amendment, the parties' lack of such local manufacturing or sales connection is just one of the factors that the TFTC will take into consideration when deciding whether or not to exercise its jurisdiction over an extraterritorial merger, and thus an extraterritorial merger may still be reviewed by the TFTC even though the parties do not have any sales or assets in Taiwan.

Imposition of the filing obligation on the ultimate controlling enterprise

Lastly, the ultimate controlling enterprise of the share acquirers in an extraterritorial merger shall be the notifying party in Taiwan if the share acquirers have controlling and subordinate relationships or are controlled by the same enterprise(s). In principle, in a transaction where one party acquires the shares of the other party, it is the acquirer who must file in Taiwan. Under the amendment, if in an extraterritorial merger the share acquirers have controlling and subordinate relationships or are controlled by the same enterprise(s), the filing obligation falls on the ultimate controlling enterprise(s).

These amendments will affect the current merger filing practice in Taiwan. In particular, transactions which did not previously trigger a merger filing may now be caught under the new “global turnover” threshold.