Asia Pacific Competition Law Bulletin

Introduction

Welcome to the third 2017 edition of our bi-monthly Asia Pacific Competition Law Bulletin. As with previous editions, this bulletin has been produced in collaboration with our Linklaters colleagues (China) and with expert local law firms around the region: Allens (Australia, New Zealand, Vietnam), Vinod Dhall in collaboration with TT&A (India), Mori Hamada & Matsumoto (Japan), Rahmat Lim & Partners (Malaysia), Allen & Gledhill LLP (Singapore), Lee & Ko (South Korea) and Tsar & Tsai Law Firm (Taiwan). We hope that you continue to find this newsletter a useful source of information on competition law issues across the Asia Pacific region.

In this edition, we look at several major competition law reforms, including in South Korea where the new administration has pledged to crack down on antitrust violations. In Japan, the competition authority proposed amendments to several enforcement guidelines and in Vietnam the government introduced a draft competition law for public consultation.

Competition authorities and courts around the region have been active in antitrust enforcement, with cartel fines in Australia, a major decision by the Supreme Court of India and a court case in Hong Kong.

On the merger side of things, we report on the blocking of transactions in Australia and in New Zealand, and on new merger control rules in Taiwan.

Australia	China	Hong Kong
India	Japan	Malaysia
New Zealand	Singapore	South Korea
Taiwan	Vietnam	

Jacqueline Downes and Sophie Matthiesson, Allens

ACCC opposes APN Outdoor/oOh!media merger; deal subsequently abandoned

The ACCC identified three issues that in its preliminary view raised competition concerns:

- Issue 1: the ACCC considered that the merger was likely to result in a substantial lessening of competition in the supply of out-of-home ("**OOH**") advertising services in Australia. The merger would result in consolidation of the number one and two providers of OOH advertising services with a combined market share of more than 50%. The ACCC found that the merger parties were each other's closest competitors and the remainder of the market was highly fragmented. The ACCC observed there were significant barriers to new entry and expansion, due to development and planning approval processes, irregular site availability, long term leases/licences with options to renew, and other incumbency advantages. The ACCC's view was therefore that the threat of entry or expansion was unlikely to constrain the merged firm from raising prices, decreasing service/quality or reducing innovation.
- Issue 2: the ACCC considered that there would be an increase in barriers to entry and expansion, as the merged firm would be the only OOH advertiser with a presence in all categories (i.e. roadside billboards, transport/transit, retail/lifestyle/other, and roadside other). The ACCC's view was that the merged firm would be a 'one stop shop' for buyers of advertising services and that it could leverage its position in categories where it is dominant, or bundle its services across categories, thereby limiting competition from other players.
- Issue 3: the ACCC considered that the merger would reduce competition for the leasing of OOH advertising sites, as a result of the loss of competitive tension between APN and oOh!media in site negotiations and tender processes. The ACCC found that this could result in reduced remuneration to site owners and/or the imposition of more onerous conditions in leases/licences.

The ACCC took a narrow approach to defining the relevant market. The ACCC considered that OOH advertising services are not substitutable for advertising services in other channels (eg, TV, radio, online advertising, etc.), because in its view OOH advertising has special characteristics not easily replicated by other channels. The ACCC also considered that there was a separate market for the leasing of OOH advertising sites from landlords because landlords are restricted in the types of tenants they can choose between (essentially different OOH providers).

Related links:

The Statement of Issues is available here.

Yazaki ordered to pay AUD 9.5 million in penalties for collusive conduct

On 9 May 2017, the Federal Court imposed penalties of AUD 9.5 million on Japanese company Yazaki Corporation for engaging in collusive conduct with a competitor when supplying wire harnesses to Toyota Motor Corporation in Australia. The ACCC has appealed the decision, commenting that significantly higher penalties were appropriate in this case, having regard to the seriousness of the conduct, together with Yazaki's size and substantial turnover related to its Australian operations. The ACCC is seeking penalties of AUD 42-55 million.

In 2015, the Federal Court found that Yazaki entered into and/or gave effect to a number of arrangements with its main competitor in Japan in relation to the co-ordination of quotes for the supply of wire harnesses used in the manufacture of Toyota Camrys in Australia. The Court held that Yazaki was subject to Australian jurisdiction as it carried on business in Australia, in parallel with its Australian-based subsidiary.

The ACCC was unsuccessful in its claims that the Australian-based subsidiary gave effect to the collusive arrangement entered into by Yazaki in Japan. The Court also found that there was no price-fixing arrangement within the terms of the former price-fixing provisions in the Competition and Consumer Act 2010, as there was no "market in Australia" for the supply of wireframes to Toyota.

The ACCC's action follows similar enforcement action against Yazaki and other cartel participants by competition regulators in the US, Canada and Japan. It arose from an immunity applicant which reported the conduct.

In imposing penalties, Justice Besanko noted the seriousness of Yazaki's conduct, stating, "[t]he conduct was deliberate, sophisticated and devious. It included the manipulation of the prices and the components of the prices so as to avoid arousing suspicion."

- For companies, potential penalties for engaging in cartel conduct are the greater of:
    - AUD 10 million;
    - three times the total value of the benefits obtained from the contravention; or
    - where benefits cannot be fully determined, 10% of the annual turnover of the company (including related corporate bodies) in the preceding 12 months.
- For individuals, potential penalties for engaging in cartel conduct are:
    - AUD 500,000; or
    - up to 10 years in jail and/or fines of up to AUD 360,000 per criminal cartel offence.

Related links:

The ACCC's media releases are available here and here.

ACCC to investigate and report on gas markets and market transparency

The ACCC will use its market inquiry powers, including its ability to compulsorily acquire information, to investigate and report on gas markets and market transparency. The ACCC will provide regular information to the market over the next three years on the supply and pricing of gas with the intention of addressing the opaqueness of the gas market.

The inquiry will run over three years, with regular reporting to the Federal government and will examine:

- the pricing and availability of offers to supply gas;
- the volumes of gas supplied or available for current or future supply, including natural gas extracted or produced in Australia, or imported into Australia;
- the pricing, volume and availability of gas for domestic supply compared to the pricing, volume and availability of gas for export; and
- the pricing, volume and availability of other goods or services, such as goods or services for drilling, storing or processing gas, that enable, assist or facilitate the supply of gas or gas transportation services in Australia.

The inquiry is intended to improve market transparency by providing a clear overview of the entire market to ensure it is operating efficiently and competition is benefiting all gas users. The ACCC will also seek to identify the use of market power and other obstructions to the efficient supply of gas, as well as publicly reporting on market information when it is needed.

The ACCC will release public reports on the state of the gas market every six months, in addition to the more regular information. The first report is due to be released in October 2017.

The inquiry follows on from the ACCC's report on the east coast gas market, which found that changes in the east coast gas market since 2012 were attributable to three factors:

- the magnitude of gas flows to the liquefied natural gas (“**LNG**”) projects in Queensland, which are removing gas from the domestic market;
- lower oil prices, which are resulting in declining investment in gas exploration and lower production forecasts for both domestic and LNG projects; and
- moratoria and regulatory restrictions, which are affecting onshore gas exploration and development.

At the time, the ACCC cautioned that the east coast gas supply outlook in the medium term was uncertain and emphasised that there was an urgent need for new gas supply from diverse sources to support the domestic market. The ACCC also made a number of recommendations around improving arrangements for gas transportation and gas market operations and transparency.

Related links:

The ACCC's media release is available here.

The government's media release is available here.

Fay Zhou and Yuan Cheng

MOFCOM’s continuous crackdown on failure to notify and gun-jumping

MOFCOM has continued its enforcement against gun-jumping and failures to notify. This follows the Canon/Toshiba Medical System decision of January 2017, where MOFCOM sanctioned for the first time a foreign-to-foreign transaction for failure to notify. After a total of six penalty decisions in 2016, MOFCOM has already published five cases in the first half of 2017.

The reinforced crackdown on failure to file echoes the recent statements made by MOFCOM officials indicating the possibility of raising the penalty standards and applying other measures to deter non-compliance.

The Meinian/Ciming acquisition involved two leading health check-up companies in China. MOFCOM found that Meinian failed to secure antitrust approval prior to implementing the first step of a series of interrelated transactions. Like the Canon/Toshiba Medical System merger, Meinian acquired a 100% equity interest in Ciming through a series of interrelated transactions, which were all governed under a single share purchase agreement. However, the parties only submitted a filing to MOFCOM before implementing the final transaction. Upon review, MOFCOM considered that the acquisition would not raise competition concerns, but imposed a fine of RMB 300,000 (approximately USD 44,000) on Meinian for the procedural infringement.

One notable feature of the case is the lengthy investigation process. The case can be traced back to March 2016 when iKang, a rival company, filed a complaint to the MOFCOM. Four months later, Meinian disclosed in its securities filing that the company has received a case acceptance notice issued by MOFCOM. MOFCOM then took another nine months before publishing its decision in May 2017. This confirms that a review of a concentration following a non-notification or gun-jumping investigation is longer than the ordinary MOFCOM review procedure.

In Guangdong Rising (Hong Kong)/PanAust, MOFCOM imposed a RMB 150,000 fine (approximately 22,000) on Guangdong Rising (Hong Kong) for failure to notify its acquisition of Australia-listed PanAust. Guangdong Rising is a wholly-owned subsidiary of Guangdong Rising Asset Management which in turn is wholly owned by the Guangdong State-Owned Assets Supervision and Administration Commission. Guangdong Rising made a general offer on 30 March 2015 to acquire the full equity ownership of PanAust and the transaction was completed on 20 July 2015 without prior MOFCOM clearance, in obvious violation of merger control rules. Guangdong Rising proactively filed with MOFCOM after completing the transaction. The company cooperated with MOFCOM during the investigation, which contributed to a lower fine.

The continued wave of sanctions confirms MOFCOM’s hardened stance on gun-jumping and failure to notify. It also demonstrates MOFCOM’s increasingly sophistication in probing alleged breaches involving complex deal structures.

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

Hong Kong court confirms bar on standalone private actions in competition cases

The Hong Kong Court of First Instance rejected a claim that it had jurisdiction to determine whether a trade association violated the Competition Ordinance.

The court reasoned that determination of a breach of the Competition Ordinance was reserved for the Competition Tribunal. In the absence of a right of standalone private action under Hong Kong competition law, arguments for breach of the competition rules brought by the plaintiff could not be made in the Court of First Instance. The court also refused to transfer the case to the Competition Tribunal, without providing a test or an indication of the necessary threshold for such a transfer.

This case confirms it is not possible to bypass the statutory bar on standalone private actions by combining competition arguments with other arguments in a legal action.

Background

In a dispute between a travel agent ("**Loyal Profit**") and the Travel Industry Council ("**TIC**"), Loyal Profit claimed that certain directives of the TIC violated the Companies Ordinance and the Competition Ordinance.

Loyal Profit challenged the TIC's "Registered Shops Scheme" on competition grounds. Under this scheme, travel agents who are members of the TIC may only bring inbound tour groups to shops registered with the TIC. Registration must be made by the travel agents before they may arrange for tour groups to visit these shops. In turn, the registered shops must offer full refund protection to visitors. The TIC's explanation for the scheme is that it is designed to protect the reputation of Hong Kong as a "shopping paradise" and support the tourism industry.

Loyal Profit's argument under the Competition Ordinance is that the Registered Shops Scheme is anti-competitive because "it interfered with competition between shops".

The Competition Ordinance prohibits "independent actions", meaning proceedings brought in any Hong Kong court independently of the Competition Ordinance, and where the cause of action is a contravention of a conduct rule. Loyal Profit tried to circumvent this prohibition by asking the court to confirm that the Registered Shops Scheme (1) breaches the TIC's Memorandum of Association, which explicitly prohibits the TIC from "interfering in any way with initiative and enterprise based on fair trading"; and further (2) breaches the Memorandum of Association because the scheme contravenes the Competition Ordinance.

Ruling

Loyal Profit's argument was dismissed in the Court of First Instance. According to Mr Justice Harris, the Competition Ordinance clearly provides that only the Competition Tribunal can determine whether there has been a breach of the Competition Ordinance, and only the Competition Commission (not private parties) can bring a complaint of infringement of competition rules to the Competition Tribunal for adjudication.

Yet the court went beyond the jurisdictional argument, stating that even if it were in a position to rule on a competition law argument, the plaintiff would at a minimum have to articulate a base case for breach of the Competition Ordinance, in a manner similar to what the Competition Commission itself would do. As Loyal Profit did not even attempt to make such a case, its case could not succeed in any event.

Finally, Mr Justice Harris refused to transfer the case to the Competition Tribunal, without much explanation, stating simply "[t]his I will not do. On the basis of the evidence before me I am unable to form the necessary view that there is a matter to be investigated by the Competition Tribunal."

Key takeaways

Under the Hong Kong competition regime, the Competition Commission is tasked with taking on complaints and conducting investigations before bringing cases to the Competition Tribunal. The Competition Ordinance makes it very clear that standalone actions cannot be made independently, though this was an option in an earlier version of the Competition Bill before it was passed into law.

As expected, the Court of First Instance confirms that it will not circumvent such design by the legislature, in particular by considering competition law claims "wrapped" within other legal arguments. However, Loyal Profit is not left without a remedy, as it remains free to lodge a complaint with the Competition Commission for further action.

Faced with a claim whose cause of action was (at least in part) a contravention of a conduct rule, the Court of First Instance had no choice but decline the transfer request. By contrast, in the case of a competition breach being raised as a defence, the Court of First Instance would have to transfer the case to the Competition Tribunal for adjudication (at least in respect of the competition law aspect of the case). It is however interesting to note that the Court of First Instance did not merely approach the issue from a pure jurisdictional angle (directly declining the transfer) but went further, setting out how the plaintiff should have presented its case for the Court of First Instance to consider both the claim and the transfer request.

This raises the question of whether, had the plaintiff brought a base case on competition law grounds, the Court of First Instance would indeed have considered the argument substantively, or at least the transfer request. If the Court of First Instance meant to set out a clear test for the transfer of cases, in terms of substance and evidentiary burden, the brevity of the judgment on this issue does not allow the reader to draw clear conclusions on this important issue, which is regrettable.

This judgment comes at a time when both the legislature and the Competition Commission seem supportive of introducing a standalone right of action back into the Competition Ordinance, on the grounds that public enforcement alone is not sufficient to address competition concerns arising in Hong Kong.

Finally, it is worth noting that, as with the TVB case which was heard in the Court of First Instance in 2015 and 2016, the judgment relies heavily on UK and EU competition precedents. This shows that Hong Kong courts will continue to draw from a wide range of sources to address competition issues, which remain an uncharted territory in Hong Kong courts.

Related links:

The case, Loyal Profit International Development Ltd v Travel Industry Council of Hong Kong [2016] HCMP 256/2016, can be found here.

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Former senior US antitrust official takes the top job at the Hong Kong Competition Commission

On 19 June 2017, the Hong Kong Competition Commission announced that Brent Snyder, former Deputy Assistant Attorney General for criminal antitrust enforcement at the US Department of Justice, has been appointed as its new Chief Executive Officer. Brent Snyder will take over on 4 September 2017 from the incumbent, Rose Webb.

Brent Snyder brings with him over 14 years of US antitrust enforcement experience, including since 2013 serving as the head of criminal antitrust enforcement. His role as Deputy Assistant Attorney General saw him overseeing the US DOJ's antitrust criminal prosecutions and leading policy developments such as revisions to the leniency programme.

During his tenure, the US DOJ's emphasis was placed on holding both individuals and companies to account, imposing hundreds of millions of dollars in fines ever year against cartel participants, across all sectors of the economy. Brent Snyder contributed to the DOJ's many achievements in global cartel enforcement. He oversaw some of the most high-profile criminal cartel prosecutions in the US in recent years, securing for instance a 5-year jail sentence against company executives in a shipping cartel; multiple jail sentences against senior executives and a record USD 500 million fine in the LCD cartel; and the prosecution of several individuals accused of rigging tenders for public school bus transportation contracts in Puerto Rico. Mr Snyder also managed a number of innovative domestic cases such as the price-fixing investigation into sellers of posters on Amazon Marketplace.

Brent Snyder's arrival in Hong Kong comes at a critical time for competition law enforcement in the city, amid public and political pressures in favour of a more vigorous approach to enforcement. With Mr Snyder as CEO, the HKCC's overall enforcement priorities will likely remain focussed on cartels and bid-rigging cases.

Brent Snyder's first task will be to press ahead with the Commission's small docket of ongoing cases. He may also seek to bring more certainty to the HKCC's leniency policy, which has yet to become a meaningful tool for cartel detection in Hong Kong. Under the current leniency rules, the first applicant to bring a case to the HKCC's knowledge can receive complete immunity from fines, but subsequent applicants have no guarantee that they will benefit from their cooperation with the regulator.

When Brent Snyder arrives in Hong Kong, he will need to navigate a number of challenges at the HKCC, including leading current cases to successful enforcement outcomes, influencing the debate over the adequacy of the authority's budget for its future litigation, and the future of the statutory bodies' exemption.

Brent Snyder will be the third holder of the CEO post since the creation of the HKCC in 2015 and has been appointed for three years. He will replace Rose Webb, who will return to Australia in September.

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

Supreme Court rules that CCI penalties to be limited to relevant turnover

In an 8 May 2017 ruling, the Supreme Court of India ruled that antitrust penalties can only be levied on a company's "relevant turnover", i.e. the turnover of the goods or services affected by the anti-competitive practice for which the company is being fined.

In India and in most jurisdictions, antitrust fines are calculated as a percentage of a company's turnover. The determination of the relevant turnover therefore has a major impact on the total amount of pecuniary penalties.

This ruling concludes a long-running debate between the Competition Commission of India ("**CCI**") and the Competition Appellate Tribunal ("**COMPAT**"). The CCI's practice to date has been to impose fines on the entire turnover of companies, whereas the COMPAT took a different view and reduced several antitrust fines on appeal in recent years. This ruling is the result of an appeal by the CCI of a COMPAT decision.

The Supreme Court of India ruled that it is a requirement of the principle of proportionality and of the purpose of the Competition Act to impose fines on the relevant turnover.

Related files:

A copy of the Supreme Court order is available here.

Kenji Ito and Aruto Kagami, Mori Hamada & Matsumoto

JFTC launches public consultation on distribution guidelines

On 7 April 2017, the Japan Fair Trade Commission ("**JFTC**") published for public consultation a draft amendment to its Guidelines on Distribution and Business Practices.

The proposed amendment simplifies the structure of the guidelines, and updates some rules to reflect changes in modern business practices, linked for instance to the rise of e-commerce.

Scope of the Distribution Guidelines

The new guidelines consist of three chapters: (i) restrictions on counterparties; (ii) choice of trading partners; and (iii) distributorship.

The first chapter deals with vertical restraints such as resale price maintenance, rebates and other non-price restrictions. Non-price restrictions include exclusive dealing, territorial restrictions, selective distribution and downstream sales restrictions. The amendment proposes to set up a new sub-section on tying practices, which have been a growing concern of the JFTC.

The second chapter concerns single-firm and collective boycotts, and the third chapter concerns sole distributorship and parallel imports, among others.

Competitive assessment

The amendment seeks to clarify the basic framework for assessing competitive harm. The draft guidelines provide examples of when the JFTC considers that an exclusionary effect or price stabilisation will likely result from a non-price restriction. Reflecting another growing area of concern for the JFTC, the draft guidelines address network effect issues posed by internet platforms.

Overall, the proposed amendment does not represent a significant departure from the current practice of the JFTC. Yet it sheds light on how the regulator will handle future distribution cases.

The JFTC will consider the feedback from the public before amending the guidelines.

Related Links:

The announcement by the JFTC (in Japanese) can be found here.

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JFTC publishes report on administrative surcharge system reform

On 25 April 2017, the JFTC published for public consultation a report on potential amendments to its administrative surcharge system. The report was prepared by the study group set up by the JFTC and summarises a year-long discussion on the reform project.

Currently, under the Antimonopoly Act, the amount of surcharge is calculated by multiplying a certain fixed percentage by the value of sales of the products or services at issue for the period of the violation concerned – up to three years. The percentage is determined by the size of the firm and the level of distribution at which the firm operates in (10% for mid-size manufacturers, for example).

The JFTC does not have much discretion in determining the relevant sales and cannot consider factors such as the seriousness of the violation and the degree to which the parties cooperated with the JFTC during the investigation. The report criticizes this system as too rigid and not effective in terms of cartel deterrence and cooperation from the parties.

The report proposes the following amendments:

- enabling the JFTC to impose surcharge based on "artificial sales", for cases where a foreign enterprise does not have actual sales in the domestic market as a result of a market-sharing cartel;
- replacing the three-year limit with ten-year limit;
- increasing the deterrence multiplier; and
- enabling the JFTC to take account of cooperation as well as obstruction of investigation in setting the level of surcharge.

The report also considers the possibility of introducing the attorney-client privilege in the context of JFTC investigations. Although the report cites a lack of legal basis for the introduction of such privilege as a legal principle, it suggests that the regulator would nonetheless pay appropriate consideration to it during operations.

Related Links:

The announcement by JFTC can be found here.

Raymond Yong and Penny Wong, Rahmat Lim & Partners

MyCC proposes to renew block exemption for the shipping sector

On 21 June 2017, the Malaysia Competition Commission ("**MyCC**") renewed the Block Exemption Order ("**BEO**") for the Vessel Sharing Agreements and Voluntary Discussion Agreements in respect of liner shipping services for a further two years. The previous BEO granted by the MyCC has been in place for three years.

BOEs are granted by competition authorities or government to exempt a certain type of agreements from competition rules, often on the basis that these agreements are necessary to produce economic efficiencies.

Vessel Sharing Agreements are entered into by shipping companies seeking to exchange containers to improve ships' utilisation. Voluntary Discussion Agreements allow shipping companies to discuss on a non-binding basis information relating to the industry, such as technical and safety standards and supply and demand data.

The MyCC has conducted a public consultation to obtain feedback on the renewal of the BEO. The application for renewal of the BEO was submitted jointly by the Malaysia Shipowners Association and the Shipping Association of Malaysia.

Following the public consultation, the MyCC considered that the application met the conditions for the proposed renewal to be granted, in that:

- there are significant identifiable efficiency benefits arising from the liner shipping agreements;
- the benefits could not reasonably have been provided by the parties to the liner shipping agreement without the agreement having the effect of preventing, restricting or distorting competition;
- the detrimental effect of the liner shipping agreements on competition is proportionate to the benefits provided; and
- the liner shipping agreements do not allow liner operators to eliminate competition completely in respect of a substantial part of the liner shipping services.

The exemption of certain agreements between liner shipping companies is in line with the practice of several jurisdictions, including Singapore and Japan. The Hong Kong Competition Commission recently proposed a BEO for Vessel Sharing Agreements, although it is resisting the request to allow liners to exchange price-related information.

When the MyCC first granted a BEO to the shipping sector in 2014, a number of trade associations representing various business interests launched a court battle against the order. A Malaysian court ruled in 2015 that the MyCC was acting within its powers when it granted the BEO.

Related links:

The MyCC press release can be found here.

Carolyn Oddie, Rob Walker and Amanda Richman, Allens

Commission blocks NZME/Fairfax merger

On 2 May 2017, the New Zealand Commerce Commission ("**NZCC**") released its final decision, declining to clear or authorise the merger between media companies, NZME and Fairfax. The NZCC found that the proposed merger was likely to substantially lessen competition in advertising and reader markets. The NZCC also found that the merger was unlikely to generate sufficient public benefits to outweigh the lessening of competition. The merger would have brought together New Zealand's two largest newspaper networks and two largest online news sites under common ownership. The parties have appealed the NZCC's decision to New Zealand's High Court.

Clearance decision

The NZCC first considered whether the merger would be likely to substantially lessen competition in advertiser and reader markets.

The NZCC recognised that the parties operate in a challenging and rapidly changing commercial environment, as a result of consumers switching to 'new media' sources. The NZCC accepted that the parties' business models were in a transition phase and that digital revenues were not currently replacing falling print revenues. However, the NZCC did not accept that the parties would be unable to survive as independent operations without the merger.

The NZCC found that NZME and Fairfax were each other's closest competitors and the merger would be likely to substantially lessen competition in a number of advertising and reader markets by increasing prices and/or decreasing quality. The NZCC did not consider other print alternatives or services such as Facebook, flyers or radio to be effective substitutes to the parties' publications.

In terms of the risk to quality journalism, the parties submitted that the two-sided nature of the market was a sufficient incentive to produce high quality journalism, on the basis that if quality diminished so too would readership and this would impact on advertising revenue.

The NZCC considered that the key driver for quality was competition between the parties and was concerned that the merger would reduce the range, volume and variety of news produced. The NZCC found that, due to the two-sided nature of the market, internal safeguards (such as journalistic codes of ethics, and alternative news providers, including social media) would not be sufficient to constrain the merged entity.

Authorisation decision

The NZCC then considered whether the merger should be authorised on the basis that it would result in significant public benefits to New Zealand.

The NZCC was satisfied that the merger would result in a quantifiable net public benefit of between NZD 40 to around NZD 200 million over five years, as a result of savings on corporate overhead costs, as well as editorial and operational cost savings. The NZCC also accepted there was an unquantifiable public benefit in prolonging the longevity of print publications, although noted this may be only transitory.

However, the NZCC's key concern with the merger was the likely loss of media plurality. The NZCC rejected the parties' submission that plurality was not a relevant detriment because it was non-economic in nature. The NZCC confirmed that it could consider any category of negative consequences related to a proposed merger. The NZCC noted that plurality considerations are important in New Zealand, given the high concentration level of media ownership (the merged entity would include nearly 90% of the daily newspapers).

The NZCC also found that the merger would be likely to cause a loss of quality as a result of the loss of competition between NZME and Fairfax.

The NZCC therefore concluded that the benefits identified were not sufficient to outweigh the detriments to the New Zealand public.

On 26 May 2017, NZME and Fairfax announced that they are appealing the NZCC's decision to the High Court.

Related links:

The New Zealand Commerce Commission's media release is available here.

The Notice of Appeal is available here.

Daren Shiau and Elsa Chen, Allen & Gledhill LLP

CCS reviews merger involving silicon wafer and semiconductor memory manufacturers

On 12 May 2017, the Competition Commission of Singapore (the "**CCS**") issued a media release announcing that it had reviewed the proposed acquisition by SK Holdings of 51% of LG Siltron.

Although the parties have submitted that there are no horizontal overlapping goods or services sold by the parties globally or within Singapore, the CCS noted that there may exist vertical links between the parties. Accordingly, when evaluating the relevant product markets, the CCS focused its assessment on the upstream supply of silicon wafers, and downstream supply of Dynamic Random Access Memory ("**DRAMs**") and NAND flash memory products that may be vertically integrated as a result of the proposed transaction.

Following its research and market surveys, the CCS concluded that the acquisition, if carried into effect, is unlikely to lead to a substantial lessening of competition in the supply of silicon wafers, supply of DRAMs and supply of NAND flash memory products within Singapore on the basis that:

- in relation to the supply of silicon wafers, customers generally purchase from multiple sources and are able to switch between silicon wafer suppliers;
- in relation to the supply of DRAMs and NAND flash semiconductor memory products, customers and competitors provided feedback that they have no concerns with the acquisition, and believe that it would have limited impact on their respective businesses; and
- with regard to the vertical effects of the merger, the impact on both silicon wafer customers and silicon wafer suppliers is likely to be limited.

This is the ninth merger notification assessed by the CCS involving the semiconductor industry generally, and the third merger notification in the past 12 months in which the CCS considered non-horizontal concerns (i.e. vertical effects and conglomerate effects).

Related Links:

The CCS's media release can be found here.

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Yong Seok Ahn and Bryan Hopkins, Lee & Ko

Outlook on competition regulation under the new Korean administration

President Moon Jae-in and his administration have pledged to roll out the following changes to competition regulation to achieve President Moon's goal of "economic democratisation": (i) strengthened enforcement measures that will include a stepping up of criminal enforcement and an expansion of the investigatory powers of the Korea Fair Trade Commission (the "**KFTC**"); (ii) stricter regulation of conglomerates (Chaebols) to ensure transparency in their corporate governance structures; and (iii) prevention of abuse of superior economic power by strengthening the punitive damages system and introducing consumer class action lawsuits.

Some of these measures are expected to be implemented as of this year, whereas others are expected later.

Below we detail some of the key changes expected to be implemented in 2017 and 2018:

- <u>Criminal sanctions for obstructing KFTC investigations</u>. Amendments to the Monopoly Regulation and Fair Trade Act ("**MRFTA**") taking effect on July 19 this year will substantially increase the penalties for tampering or destruction of evidence, and for refusal to submit information/materials in a KFTC investigation. The amendment creates criminal fines for KRW 150 million (approximately USD 150,000) and imprisonment for up to years for individuals obstructing investigations.
- <u>Expansion of punitive damages</u>. Punitive treble damages have recently been introduced in various regulations. Under the recently amended Fair Retail Agency Transactions Act (the "**FRATA**"), retail agents may recover up to three times damages caused by forced purchase or forced provision of economic benefit in violation of the FRATA. The amended Product Liability Act which becomes effective in April of 2018, also introduces punitive treble damages and lowers the burden of proof for product liability claims.
- <u>New regulations to address abuse of superior bargaining position</u>. Various new laws and amendments entering into effect this year or next to prevent abuse of superior power in relation to franchising, subcontracting, agency transactions and online transactions, among others. With the advent of the amended FRATA, the KFTC is expected to actively investigate and sanction violations of the FRATA, particularly in the retail sector.

<u>Changes Expected Going Forward</u>

- <u>Abolishment of the KFTC's exclusive criminal referral authority</u>. Currently, the KFTC has the exclusive authority to refer an alleged competition law violation to the Prosecutor's Office for criminal prosecution. The KFTC has generally reserved referrals for severe violations. The Moon Administration has pledged to abolish this exclusive authority, which would enable the Prosecutor's Office to initiate its own investigations into competition law violations and allow others to file complaints directly with the Prosecutor's Office. This proposal is likely to face significant challenges and opposition. The new KFTC chairman appointee, Professor Sang Jo Kim mentioned that the KFTC may consider granting criminal referral authority to other organisations.

- Class actions for competition law violations. The Moon Administration will likely seek to introduce a class action system to redress consumer harm caused by competition law violations. The Moon Administration has also stated that it will establish a fund to support consumers that suffer from anticompetitive conduct. With the introduction of a class action system, follow-on damage actions are expected to rise significantly.
- Increased regulation of conglomerates. In addition to its measures to prevent abuse of superior bargaining position (which will focus largely on the conglomerates), it is likely that the Moon Administration will also regulate questionable practices prevalent among Chaebols, including cross-shareholding and other improper corporate governance structures that provide corporate control to a few major shareholding families.

Matt Liu and Elvin Peng, Tsar & Tsai Law Firm

Revision of merger control procedure

On 26 May 2017, the Legislative Yuan amended several aspects of the merger control rules. The changes affect three aspects of the merger control process:

- Review timetable. The reform give the Taiwan Fair Trade Commission ("**TFTC**") 30 *working days* in phase I and an additional 60 *working days* in phase II – up from 30 *calendar* days and 60 *calendar* days prior to the reform. As a result, parties to a merger or acquisition must allocate more time for phase II reviews when planning their transactions.
- External consultations. The new rules provide that the TFTC may consult with research institutes and academics to collect industrial and economic analysis during merger reviews. It is expected that the TFTC will use this power in complex cases, or in cases requiring a comprehensive economic analysis.
- Target company's opinion in hostile takeovers. Under the new rules, the TFTC will afford target companies of hostile takeovers the possibility to submit an opinion on the competition aspects of the proposed transaction.

The new rules entered into force on 16 June 2017.

TFTC suspends first investigation under new procedure

Last month, the TFTC announced that it has used its power to suspend an investigation for the first time. The suspension procedure is similar to an Article 9 commitments decision in the EU.

The procedure has been available since a 2014 reform took effect, but no company under investigation had made a successful application until 2016. The case was only made public recently.

The case concerned a manufacturer of pre-paid products, such as gift cards, pre-paid cards for online games and pre-paid debit cards. The company allegedly entered into exclusive supply agreements with the country's top four retail franchises and with other distributors. A competing manufacturer complained to the TFTC that it was prevented from distributing its products in most of the brick-and-mortal shops in Taiwan.

During the investigation, the manufacturer applied to the TFTC and proposed to amend its business practices. The company made the following commitments:

- to shorten the duration of the exclusivity clause in all its current distribution agreements;
- to not restrict the cooperation between competing manufacturers and distributors; and
- to not include exclusivity clauses in future contracts.

After reviewing the proposed commitments, the authority accepted these undertakings and suspended the investigation. It took into consideration the fact that it had not yet uncovered evidence of anti-competitive activity.

The company is required to report to the TFTC and to disclose its future distribution agreements to the regulator for review.

It is interesting that the TFTC accepted the commitments offered by the company despite considering the alleged conduct as a hardcore anti-competitive practice.

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Vietnam publishes new draft law on competition for comments

In early April, the Vietnamese Government published a new draft Law on Competition ("**Draft Law**") for comments. The Draft Law is scheduled to be passed in 2018 to replace the current Law on Competition, which has been in place for more than 10 years.

Below we summarise the key changes included in the Draft Law.

1 New National Competition Commission

The Draft Law introduces the National Competition Commission ("**NCC**") as a single independent competition authority. The NCC will replace the two authorities established under the current regime.

2 *Per se* illegality and rule of reason assessment for anti-competitive agreements

The Draft Law establishes a framework for the assessment of agreements. Hardcore cartels between competitors (including price fixing, customer allocation, restrictions of output and bid rigging) are prohibited *per se*. Other vertical agreements and horizontal agreements are banned if they cause "substantial anti-competitive effects in the market".

3 Leniency program for participants in agreements in restraint of competition

The Draft Law creates a leniency program, whereby an enterprise can voluntarily report an anti-competitive agreement to the authority and receive immunity or a fine reduction. The NCC will make leniency decisions based on a number of factors, including the order in which applicants approached the NCC, the level of trustworthiness and the value of the information provided.

4 Economic concentration notification thresholds

Under the current regime, economic concentrations must be notified to the competition authority where the combined market share of the parties in any relevant market is between 30% and 50%. Economic concentrations resulting in a 50% market share or more are prohibited unless exempted by law.

The Draft Law adopts a stricter approach. An economic concentration must be notified if:

- one party has a market share of 20% or more in any relevant market;
- the transaction has a value of VND 300 billion (approximately USD 13 million) or more; or
- the total domestic revenue of any party in the previous financial year exceeds VND 500 billion (approximately USD 22 million).

Economic concentrations which have a potentially negative impact on competition in Vietnam are prohibited.

5 Remedies for economic concentrations

The Draft Law introduces a commitment procedure for economic concentrations. Commitments allow parties to a concentration which triggers competition issues to obtain clearance nonetheless, by offering structural or behavioural remedies to address the competition authority's concerns. The Draft Law will align Vietnam with the practice in most jurisdictions in this regard, where commitments are a standard tool of competition law.

6 Removal of prohibitions of certain unfair competition practices

The Draft Law removes prohibitions against certain unfair competition practices, such as advertisement and promotion aimed at unfair competition, which are dealt with under other legislations.

The Draft Law is expected to be further revised before finalisation and submission for approval to the National Assembly.