Linklaters Asia Pacific Competition Law Bulletin

Introduction

Welcome to the first edition of the Linklaters Asia Pacific Competition Law Bulletin.

This newsletter will deliver to you every two months the need-to-know competition law developments in the Asia Pacific region, which is witnessing a growing focus on antitrust enforcement in almost every jurisdiction and across multiple industries.

This bulletin has been prepared by our own teams and in collaboration with expert local law firms from around the region: Allens (Australia, New Zealand, Vietnam), Vinod Dhall in collaboration with TT&A (India), Widyawan & Partners (Indonesia), Mori Hamada & Matsumoto (Japan), Rahmat Lim & Partners (Malaysia), Allen & Gledhill LLP (Singapore), Lee & Ko (South Korea) and Tsar & Tsai Law Firm (Taiwan).

In our first edition, we see that swift developments in competition and antitrust continued across the region over the summer, with a number of jurisdictions increasing enforcement and bringing landmark cases. In China, enforcement by the NDRC and SAIC has moved up a gear, with recent scrutiny in relation to monopoly agreements and abuse of dominance. In Australia, the ACCC revised its immunity and cooperation policy for cartel conduct, whilst New Zealand has released new guidelines on unfair contract terms and Malaysia has published handbooks on bid rigging. In Hong Kong, the newly formed Competition Commission has announced the appointment of its first CEO and released draft guidelines advising on the interpretation and implementation of the Competition Ordinance due to come into force in 2015. Meanwhile, Vietnam has announced that it will impose more severe penalties for competition law violations, and criminal prosecution as a result of competition law infringements has increased in Taiwan.

On the merger control front, the Indian Commission has clarified the definition of joint control for merger purposes, the Singapore Commission has initiated its first ever market testing of merger commitments and a hearing in Thailand has scrutinised the proposed merger framework.

We hope that you enjoy this new publication and that it will prove useful as you navigate the complex regulatory environment these developments bring about. We look forward to delivering more news in our next edition.

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

Australia

David Brewster and Lisa Lucak, Allens

ACCC alleges anti-competitive price sharing arrangements by petrol retailers

On 20 August 2014, the Australian Competition and Consumer Commission ("**ACCC**") commenced proceedings in the Federal Court of Australia against Informed Sources and a number of petrol retailers. The ACCC says that the 'near real time communication device' through which Informed Sources provided petrol price data to retailers operated to reduce competitive rivalry for the sale of petrol to consumers in metropolitan Melbourne.

In this latest competition case in the fuel sector, the ACCC alleges that the participating petrol retailers:

(i) provided current retail petrol prices to Informed Sources every 15 minutes;

(ii) received timely and complete pricing data and reports back from Informed Sources; and

(iii) knew they were each party to a common data arrangement with Informed Sources.

The ACCC alleges that these arrangements, including the increased certainty that detailed price information would become known to other retailers on a near contemporaneous basis, were likely to increase retail price coordination and cooperation and to remove an ability that would otherwise exist for retailers to gain a competitive advantage through discounting. The ACCC is relying on section 45 of the Competition and Consumer Act 2010 (Cth), which prohibits arrangements that are likely to substantially lessen competition.

The ACCC further supports an extension of its powers to investigate and take action against price sharing arrangements, arguing in its 25 June 2014 submission to the Competition Policy Review that application of the 'price signalling' provisions, which only apply to the banking sector, should be extended to prohibit anti-competitive disclosure of information in all sectors of the economy.

Related Links

ACCC press release "ACCC takes action against Informed Sources and petrol retailers for price information sharing"

ACCC submission to the Competition Policy Review dated 25 June 2014

ACCC releases its revised Immunity and Cooperation Policy for Cartel Conduct

The ACCC has published its revised Immunity and Cooperation Policy for Cartel Conduct under which applicants may seek civil or criminal immunity for cartel conduct. The amendments simplify the immunity application process and provide greater clarity for applicants, which is likely to further encourage cartel participants to come forward and assist with prosecution of cartel conduct.

The key changes to the immunity policy are as follows:

(i) Removal of the 'clear leader' exception. Previously, an applicant who was the 'clear leader' of a cartel and who had coerced others to participate was not eligible for immunity. The policy now removes the 'clear leader' exception following concerns regarding the uncertainty of its assessment, providing significant comfort to applicants and expanding the pool of potential applicants.

(ii) Streamlined grant of conditional criminal immunity. In an effort to reduce uncertainty and delays in receiving criminal immunity, the policy now implements a two-step process for the Commonwealth Director of Public Prosecutions ("**CDPP**") to grant criminal immunity:

(a) the CDPP will issue a 'letter of comfort', providing 'first-in-status' for the applicant; and

(b) before commencing proceedings against other cartel participants, the CDPP will grant a formal statutory undertaking confirming the grant of criminal immunity.

(iii) Recording of oral 'proffers'. The policy now expressly states that the Commission may record oral proffers. Oral proffers were traditionally a way for an immunity applicant to admit its conduct as part of a paperless process, reducing any evidence that could be obtained by third parties in civil prosecutions. This change is likely to act as a disincentive to make oral proffers.

(iv) Simplified and streamlined process. The new policy simplifies and streamlines the entire immunity application process, and is accompanied by a set of frequently asked questions which are likely to provide greater clarity and comfort for applicants.

Related Links

ACCC Immunity and Cooperation Policy for Cartel Conduct

China

Fay Zhou, Linklaters

China Steps up Antitrust Enforcement

In the 6th year of China's Anti-Monopoly Law ("**AML**"), enforcement by China's antitrust authorities has moved up a gear, underpinning the growing challenges faced by companies active in China. The National Development and Reform Commission ("**NDRC**") and the State Administration for Industry and Commerce ("**SAIC**") have both launched substantial enforcement action in respect of monopoly agreements and abuse of dominance.

NDRC and SAIC, which are responsible for the enforcement of the prohibitions against price- and non-price-related anti-competitive conduct, have been pursuing considerable enforcement activities in the first half of 2014. Recent headline cases include NDRC's probes of multinational companies in the automotive industry (including spare parts and bearing manufacturers), the high-profile Qualcomm investigation which is drawing to a close, as well as SAIC's dawn raids on Microsoft.

To date the agencies have probed into a broad range of (mostly consumer related) sectors, including aviation, books, paper, chemical, automotive, insurance, telecommunications, pharmaceuticals, milk powder, liquid crystal displays, wine, and gold. In addition, the focus of the authorities' investigations has expanded from traditional areas of interest (in particular hard-core cartel cases and resale price maintenance), which nonetheless continue to be relevant, to new frontiers such as different forms of abuse of dominance and the intersection between antitrust and IP rights (e.g. patent licensing). While SAIC is in the process of drafting a regulation on antitrust and IP rights, NDRC appears to have a head start in launching IP-related enforcement initiatives. Specifically, NDRC has investigated both IDC and Qualcomm in relation to their patent licensing practices.

Related Links

Linklaters Client Alert “China Steps up Antitrust Enforcement”

Hong Kong

Clara Ingen-Housz and Anna Mitchell, Linklaters

Hong Kong Competition Commission takes steps towards implementation of Competition Ordinance by appointing CEO and releasing draft guidelines

On 3 September 2014, Dr Stanley Wong was appointed as the Hong Kong’s Competition Commission’s (“**HKCC’s**”) first Chief Executive Officer. Dr Wong is a Canadian, who has close to thirty years experience in competition law. His previous roles include serving as the head of the competition law practice of Davis LLP in Canada for many years and as a Member of the Competition Authority in Ireland for five years. In recent years, Dr Wong has advised competition authorities in several ASEAN countries, including Singapore, Malaysia and Philippines, and he leads the European Commission projects to provide capacity building technical assistance to the Chinese and Indian competition authorities.

The appointment of Dr Wong is the final senior appointment expected for the HKCC, and marks the movement towards the HKCC developing its own enforcement agenda and overseeing the implementation of the Ordinance itself.

On 9 October 2014, the HKCC released six draft guidelines on: (i) the First Conduct Rule; (ii) the Second Conduct Rule; (iii) complaints; (iv) investigations; (v) applications for a decision on exclusions and exemptions and block exemption orders; and (vi) on the merger rule (together, the “**Guidelines**”).

The key areas of interest arising from the Guidelines are as follows:

(v) The HKCC has stated that “only a small number of vertical agreements harm competition” and as a general matter, vertical arrangements will be assessed by reference to their anticompetitive effects.

(vi) However, minimum resale price maintenance (“**RPM**”) is more likely to have an adverse impact on competition and will be considered by the HKCC as having the object of harming competition, unless the company can defend an RPM arrangement by proving there are efficiencies. Recommended and maximum resale prices are less likely to cause concerns.

(vii) The HKCC has not indicated any particular market share threshold for what constitutes substantial market power, as market share is only one factor in determining market power. The HKCC will take the market share into consideration, together with, among others, barriers to entry, buyer power and market dynamics.

(viii) Sharing of information on future prices between competitors will be considered to be an indirect form of price fixing. Other types of information exchange “run the risk of infringing the Ordinance”.

Comments on the Guidelines from stakeholders and the general public are due by 10 November 2014 for the those relating to complaints, investigations and applications for exclusions & exemptions, and by 10 December 2014 for those relating to the conduct rules and the merger rule. Once submissions have been considered, the HKCC will produce final draft guidelines for consultation with the Legislative Council. The HKCC is aiming to have finished all of its preparation

by the first half of 2015, allowing for the full implementation of the Competition Ordinance at a date to be set by the Government.

Related Links

HKCC's announcement of Dr Stanley Wong's appointment

The Draft Guidelines, an Overview and a press release (including FAQs) are available on the HKCC's website here

India

Vinod Dhall, in collaboration with TT&A

CCI clarifies definition of 'joint control'

On 9 September 2014, while clearing an acquisition of a 17.36% stake in Standard Greases and Specialties Private Limited by Tata Capital, the Competition Commission of India (the "**CCI**") clarified that an acquisition of shares with veto rights over strategic commercial decisions would not be treated as mere minority protection rights but instead would amount to acquisition of 'joint control' over an enterprise.

In this case, the following veto rights over the 'Reserved Matters' were considered to have resulted in a joint control scenario:

(i) appointment and removal of the Managing Director and the Chief Financial Officer of the enterprise;

(ii) increasing or decreasing the number of directors on the board or any committees;

(iii) approving, adopting, amending or modifying the annual budget and business plan (including any capital expenditure budget, operating budget and financing plan);

(iv) paying emoluments / bonuses to promoters or directors; and

(v) any amendment to the memorandum or articles of association of the enterprise.

In addition, the acquirers were to acquire the following rights which further strengthened the CCI's conclusion on joint control:

(i) appointment of one director on the board of directors ("**Acquirer Directors**");

(ii) appoint one Acquirer Director as the Chairman of the Audit, Remuneration and Recruitment Committees of the board of directors; and

(iii) in the event any Reserved Matter is to be discussed at any board meeting, the quorum for a board meeting required the presence of at least one of the Acquirer Directors.

CCI fines 14 car manufacturers INR 25.44 billion for anti-competitive practices

On 25 August 2014, the CCIimposed a penalty of INR 25.44 billion (approximately US$ 424 million) on fourteen car manufacturers or Original Equipment Manufacturers ("**OEMs**") for entering into anti-competitive agreements and abusing their dominance.

The CCI found that there were three separate relevant markets: (i) a primary market for the "sale of cars in India"; (ii) an aftermarket for the "sale of spare parts"; and (iii) an aftermarket for "repair and maintenance services". The CCI found that each OEM controls almost the entire production

and supply of spare parts and diagnostic tools in respect of its own brand and therefore each OEM is dominant in the markets for sale of spare parts and repair and maintenance services for its own brand.

The CCI held that the OEMs had abused their dominant position by: (i) denying independent repairers access to spare parts, tools and manuals, thereby restricting their ability to effectively compete with the OEMs' authorised dealers; (ii) engaging in unfair pricing of spare parts based on extremely high mark-ups; and (iii) leveraging their dominant position through preventing consumers from purchasing spare parts or using repair and maintenance services from dealers other than their authorised dealers.

The CCI further found that the OEMs had entered into a series of agreements with local original equipment suppliers and authorised dealers which resulted in each OEM being the sole channel for the sale of spare parts in respect of its own brand. The CCI concluded that these agreements resulted in exclusive distribution and refusal to deal.

Indonesia

David Holme, Widyawan & Partners

KPPU renews focus on financial services

The Commission for the Supervision for Business Competition ("**KPPU**") has, in recent months, renewed its focus on the financial services sector in Indonesia. In July, the KPPU signed a formal co-operation agreement with the Financial Services Authority ("**OJK**"), with the aim of harmonising regulations in the financial services sector with competition policy. The co-operation agreement is also designed to promote joint research, study and information sharing between the regulatory authorities.

One of the key recent areas of policy concern for the KPPU in the financial services sector has been exclusive bancassurance agreements pursuant to which a bank affords a particular insurer (sometimes affiliated insurers) a degree of exclusive access to the bank's distribution network. Recommendations announced by the KPPU on this practice in June 2014 indicate that the practice should not be considered to be *per se* prohibited, and that the arrangements will need to be examined on a case by case basis.

However, the KPPU has called on the OJK to increase its efforts to supervise these arrangements to ensure that they are implemented on a fair and transparent basis, and ultimately maintain appropriate levels of choice of insurer for the banks' customers. This recommendation comes on the back of investigations by the KPPU into the practices in particular of the State-owned banks (Mandiri, BNI and BRI) in entering into exclusive arrangements with affiliated insurers.

Current OJK regulations already mandate a degree of choice for credit-linked products, however, it is expected that the OJK may seek to increase its regulatory supervision in this area in the near term.

The KPPU has also recently recommended that the OJK scrap its tariff regulations in the motor vehicle and property insurance sectors. The insurance market in Indonesia is highly competitive and instances of 'tariff wars' have been known to occur. To combat this, in January 2014 the OJK issued a regulation governing, among other things, the premium tariff with respect to motor vehicle insurance and property insurance to ensure that the risks in these product lines are appropriately calculated and priced. However, the KPPU expressed concern in September 2014 that this regulation had the unintended effect of substantially removing price competition between industry

participants and creating an industry-wide regulated price cartel. The KPPU indicated that they believed that these regulations should be scrapped, and that the OJK should have faith that the market will adopt appropriate pricing mechanisms in the long-run. The OJK has so far indicated that it disagrees with these recommendations, but remains willing to discuss and analyse the issues further with the KPPU.

Japan

Kenji Ito and Yusuke Takamiya, Mori Hamada & Matsumoto

JFTC commences proceedings against discount store operator for abusing its superior bargaining position

On 27 August 2014, the Japan Fair Trade Commission ("**JFTC**") commenced hearing proceedings regarding a cease and desist order and surcharge payment order issued to DIREX Corporation ("**DIREX**"), which operates discount stores in Kyushu and other districts.

The JFTC issued the orders on 5 June 2014, which included a 1,274 million JPY (approx. US$11.68 million) surcharge for DIREX for abusing its superior bargaining position. According to the JFTC, DIREX unjustly forced its suppliers in relatively inferior bargaining positions to: (i) dispatch their employees to work at DIREX's stores displaying and removing merchandise that did not relate to that particular supplier; and (ii) provide a financial contribution that was equivalent to all or part of the discounts set by DIREX, even though the contribution was not necessarily used for promotions for that particular supplier, and a financial contribution that was equivalent to all or part of the purchase value of merchandise that was lost or damaged by a fire at a DIREX's store.

The JFTC has taken an active enforcement approach by establishing a special task force to detect abuse of superior bargaining positions. All orders that have been issued so far, however, have been appealed to hearing proceedings over the interpretation of the rules on surcharge calculation, which remain somewhat unclear.

In this regard, companies engaged in business in Japan should pay close attention, not only to the rules regarding abuse of superior bargaining positions but also to the developments and conclusions of the cases currently pending in the hearing proceedings.

Related Links

"Commencement of the hearing proceedings regarding a Cease and Desist Order and Surcharge Payment Order in connection with the abuse of a superior bargaining position" (Japanese)

"The JFTC issues a Cease and Desist Order and Surcharge Payment Order to DIREX Corporation" (English)

Malaysia

Raymond Yong and Kathleen Gooi, Rahmat Lim & Partners

MyCC imposes financial penalty on members of the Sibu Confectionary and Bakery Association for price fixing

On 30 September 2014, the Malaysia Competition Commission ("**MyCC**") issued a proposed decision to impose a total financial penalty of RM439,000 against 24 enterprises, who are

members of the Sibu Confectionery and Bakery Association ("**SCBA**"), for agreeing to increase the prices of confectionery and bakery products by 10 to 15% in the Sibu area.

Members of the SCBA had agreed to increase their price during an annual general meeting held by the SCBA, and their agreement was publicised and reported in several major newspapers.

The 24 enterprises have thirty days from the date of the proposed decision to submit written presentations or indicate whether any of them wishes to make oral presentation before the MyCC. The MyCC had previously taken action against various trade associations, including Pan-Malaysia Lorry Owners Association, Malaysia Indian Hairdressing Saloon Owners Association and Cameron Highland Floriculturist Association, for price fixing activities.

MyCC launches two handbooks on bid rigging

The MyCC has launched two handbooks on bid rigging, "Garis Panduan Menentang Tipuan Bida Dalam Perolehan Awam" and "Help Us Detect Bid Rigging" (the "**Handbooks**") as part of its continuous advocacy efforts nationwide. Bid rigging is deemed anti-competitive under section 4(2)(d) of the Competition Act 2010. However, there has not yet been a formal MyCC decision relating to bid rigging.

The MyCC has also worked towards forging a strategic alliance with related regulators and procurement bodies, including the Ministry of Finance, Malaysian Anti-Corruption Commission and the National Audit Department, to gain a better understanding and encourage further collaboration to combat bid rigging issues on a national level. For example, the MyCC signed a memorandum of understanding with Bank Negara Malaysia in June 2014 to facilitate the efficient implementation of the Competition Act 2010 while ensuring the preservation of the financial sector's overall stability

Related Links

MyCC Handbooks in respect of big rigging

New Zealand

David Brewster and Catherine Bembrick, Allens

New Zealand Commerce Commission releases draft guidelines for unfair contract terms provisions

The New Zealand Commerce Commission (the "**Commission**") has released draft guidelines on the new unfair contract terms provisions of the Fair Trading Act (the "**Act**"). These new provisions come into force on 17 March 2015 and represent a significant change to the existing consumer protection provisions in the Act. The Commission is seeking feedback from businesses and consumers, with final guidelines due to be released in November 2014.

The new provisions will apply to standard form consumer contracts. The provisions provide that a term will be unfair if it (a) would cause a 'significant imbalance' in the parties' rights and obligations; (b) is not reasonably necessary to protect the legitimate interests of the party advantaged by it; and (c) would cause detriment (financial or otherwise) to a party if relied on.

The draft guidelines shed light on how the Commission intends to interpret and enforce the new provisions, for example:

(i) A party 'advantaged' by a term must be able to justify that it is reasonably necessary to protect a legitimate interest and that that interest cannot be protected by fairer means. The

Commission expects businesses to provide evidence regarding costs, operations, business structure, risks and methods of mitigating risks, to demonstrate reasonable necessity.

(ii) The Commission will look at substance over form, particularly when determining whether a term is a penalty or whether it forms part of the price under the contract. The Commission will also look at the practical effect of terms e.g., a term is likely to be unfair if it purports to provide for a mutual penalty, but it is unlikely that the seller would ever suffer that penalty.

(iii) Businesses may have a legitimate need to vary unilaterally the terms of a contract. The Commission has indicated that it is more likely to consider terms that allow unilateral variation to be fair if the consumer is given notice of any changes and where there is a right to cancel the contract without penalty where the changes made are materially detrimental.

Singapore

Daren Shiau and Elsa Chen, Allen & Gledhill LLP

CCS initiates first ever market testing of merger commitments

The Competition Commission of Singapore (the "**CCS**") conducted its first ever market testing of proposed merger commitments from 21 August 2014 to 5 September 2014. The commitments were offered by SEEK Limited and SEEK Asia Investments Pte. Ltd. (collectively "**SEEK Asia**") on 21 August 2014 in respect of the proposed acquisition by SEEK Asia of certain recruitment business assets of JobStreet Corporation Berhad. The parties, which overlap in the provision of online recruitment advertising services and recruitment solutions in Singapore, proposed behavioural commitments to address the potential competition concerns that may arise as a result of the proposed transaction.

The behavioural commitments offered include undertakings by SEEK:

(i) not to enter into exclusive agreements with employer and recruiter customers; and

(ii) to maintain current pricing of services capped at present day rate cards or current day negotiated prices, subject to Consumer Price Index variations for a three-year period.

The Phase 2 review by the CCS, which is a more detailed assessment conducted by the CCS if it is unable to conclude during its Phase 1 review that the merger situation does not raise any competition concerns, is still on-going.

As at 2014, 25% of mergers notified to the CCS have proceeded to a Phase 2 review, while as at 2012, only 10% of such mergers proceeded to a Phase 2 review. Consequently, commitments, particularly local remedies, have increasingly become a feature of merger clearances. Organisational changes in the CCS this year, such as the formation of the Commitment and Remedies Unit, an internal function unit in the CCS, could also be a factor contributing to the CCS' willingness to assess the suitability of commitments. Going forward, this could entail preparing upfront remedies and voluntary commitments to accelerate clearance for merger parties.

Related Links

CCS press release "CCS Consults on the Commitments Proposed by SEEK Ltd. and SEEK Asia Investments Pte. Ltd. in relation to the Proposed Acquisition of JobStreet Singapore"

CCS clears the first airline acquisition

The CCS has issued its first Phase 1 merger clearance in the airline industry for the acquisition by Cebu Air, Inc. ("**Cebu Pacific**") of Southeast Asian Airlines (SEAir), Inc. ("**SEAir**") on 15 September 2014. This is to-date the only other merger cleared by the CCS in 2014, aside from the merger between Holcim Ltd. and Lafarge S.A. on 22 August 2014.

The decision reinforces the CCS' earlier decisional practice that it will consider each origin and destination route as potentially forming a separate market. The clearance hinged on the fact that on the only overlapping route between Cebu Pacific and SEAir, i.e. Singapore-Clark, the number of competitors in the relevant market had not changed as a result of the acquisition, in view of Tiger Airways Singapore Pte. Ltd. ("**Tigerair Singapore**") re-entering the Singapore-Clark route, which would impose a competitive constraint on the merged entity. Specifically, the CCS noted that Tigerair Singapore currently has higher seat capacity than Cebu Pacific (despite its low market share) on this route, and therefore has the ability to compete aggressively to improve its passenger load factor. The CCS had also considered evidence which suggests that Tigerair Singapore has exerted competitive pressure on Cebu Pacific.

The CCS did not consider the Strategic Alliance Agreement ("**SAA**") entered into between Cebu Pacific and Tigerair Singapore, among others, to qualify for the ancillary restriction exclusion, and has not made any finding on whether the SAA, among others, may otherwise infringe the Competition Act, Chapter 50B of Singapore.

Related Links

CCS Grounds of Decision for the Acquisition By Cebu Air, Inc, Of Southeast Asian Airlines (Seair), Inc.

A bulletin drafted by Allen & Gledhill on the above can be found here.

South Korea

Yong Seok Ahn and Bryan E. Hopkins, Lee & Ko

Criminal prosecution as a result of competition law infringements increases

On 16 July 2013, Korea's competition laws, the Monopoly Regulation and Fair Trade Act ("**MRFTA**") and the Fair Subcontract Act were amended to allow several governmental agencies to refer or request criminal prosecution for alleged violations to the Korea Fair Trade Commission ("**KFTC**"). Effective as of 17 January 2014, agencies such as the Small & Medium Business Administration ("**SMBA**"), The Board of Audit and Inspection of Korea, and the Public Procurement Service, have been able to refer or request criminal prosecution of alleged competition law violations to the KFTC, which then must refer such cases to the Public Prosecutor's Office ("**PPO**") for prosecution.

Previously, the KFTC had the exclusive authority to initiate criminal investigations of MRFTA violations, by referring the case at its discretion to the PPO for prosecution. In accordance with the competition law amendments, on 3 September 2014, the SMBA requested the KFTC to refer three companies to the PPO for prosecution under competition law violations.

The criminalisation of competition law violations has now become a major risk facing both domestic and international companies doing business in Korea. This is not only evidenced by an increase in criminal referrals by the KFTC but also recent court cases imposing prison sentences

of up to two years on local executives for bid-rigging. In recent bid-rigging cases, criminal penalties were imposed not under the MRFTA but under the Construction Industry Basic Act and Penal Code for bid-rigging. Besides criminal prosecution for companies and employees involved in cartels, unfair transactions under Korea's competition law are now subject to criminal prosecution. It is therefore expected that because of the recent amendments to the MRFTA and the Fair Subcontract Act, criminal prosecutions will increase as the KFTC becomes more aggressive in order to maintain its position as the official competition law watchdog but also due to referrals from other agencies.

Taiwan

Matt Liu and Sonia Chen, Tsar & Tsai Law Firm

Taiwanese court upholds the TFTC's decision against the practice of below-the-average-cost pricing in a hospital drug bidding

In June, the Taipei High Administrative Court (the "**Court**") issued a decision confirming that a drug distributor violated Paragraph 3 of Article 19 of the Taiwan Fair Trade Act by selling a branded drug at a price below its average cost, thereby upholding the NT$ 3 million administrative fine imposed by the Taiwan Fair Trade Commission ("**TFTC**").

In a hospital drug tender in 2008, the distributor of a branded drug offered to sell the drug below its average cost, provoking the distributor of the generic drug to file a complaint with the TFTC.

The TFTC determined the relevant market to be "drugs which have Escitalopram as their principal active ingredient and which are used for the treatment of depression". Since the branded drug was off-patent, and the distributor's turnover did not exceed the threshold of a monopolist, the TFTC did not consider that the conduct constituted predatory pricing under the provision dealing with monopolists' prohibitive conducts. However, since such conduct was economically unreasonable and was intended to foreclose the generic drug, such conduct constituted an unfair practice under Paragraph 3 of Article 19. The TFTC's decision has now been confirmed by the Court.

Supreme Administrative Court confirms the TFTC's approach that the element of "mutual understanding" in a concerted action case can be proved by indirect evidence

In October 2011, three fresh milk producers, together holding 80% of the market share, were fined NT$ 10 million, NT$ 12 million, and NT$ 8 million respectively, for jointly raising the prices of fresh milk. In June this year, although the fresh milk producers contended that there was no direct evidence for their mutual understanding to raise prices, the Supreme Administrative Court confirmed their engagement in a concerted action on the basis of indirect evidence of a mutual understanding and upheld the fines.

The main issue in the case is whether a mutual understanding existed among the fresh milk producers. Despite the fact that the TFTC couldn't find direct evidence against them, the TFTC instead relied on indirect evidence, such as the time and range of price increase and the cost structure of each producer, to determine that if not for the fresh milk producers' mutual understanding to raise prices, there would be no such parallel behaviour. Considering that a subjective standard for mutual understanding is difficult for the TFTC to establish, the Supreme Administrative Court ("**SAC**") held that indirect evidence can be used to establish the existence of mutual understanding.

The SAC further held that since a concerted action may seriously affect the functions of the market and may need to be expeditiously dealt with, the TFTC need not send a notification to the fresh milk producers telling them to correct their behaviour, nor does it need to employ any long-term monitoring prior to imposing the administrative fines. The TFTC may choose the action it deems appropriate to address such concerted action.

The court decision (Supreme Administrative Court 103 Pan-Zi No. 294) can be found in the database maintained by the Judicial Yuan.

Thailand

Wilailuk Okanurak, Pornpan Chayasuntorn and Sirimas Porasupattana, Linklaters

Hearing on merger control regulations scrutinises TCC's proposed framework

On 22 August 2014, a hearing on merger control regulations was held in Thailand. The aim of this hearing was to review the criteria approved by the Trade Competition Commission ("**TCC**") on 6 June 2013, which purports to distinguish which transactions are subject to merger filings and/or prior approval by the TCC.

While the Trade Competition Act sets out a merger control framework under which regulatory approval may be required for certain M&A activities, no secondary legislation setting out clear rules and criteria regarding which M&A transactions would be subject to approval, has so far been enacted in Thailand.

Over the years, the TCC has made a number of attempts to regulate for a merger control framework. The regulations approved by the TCC on 6 June 2013 are the most recent effort to achieve this. These set out the following criteria: (i) in the case of a merger, (a) the market share in Thailand of the buyer and/or the target is equal to or greater than 30% and (b) the combined sales/revenues for any goods or services in Thailand of the buyer and the target during the previous year were equal to or more than THB 2 billion; or (ii) in the case of an acquisition of shares with voting rights representing 25% or more of a public company or 50% or more of a private company, (a) the market share in Thailand of the buyer and/or the target is equal to or greater than 30%, and (b) the combined sales/revenues for any goods or services in Thailand of the buyer and target during the previous year were equal to or more than Baht 2 billion.

During the 22 August hearing, the criteria, particularly those relating to sales/revenue, came under heavy scrutiny.

So far, however, there has been no conclusion or indication as to when final merger control regulations will be issued or, indeed, whether such regulations will substantially be the same as approved by the TCC in June 2013.

Related Links

http://otcc.dit.go.th/otcc/upload/เกณฑ์การรวมธุรกิจ.pdf (Thai)

http://otcc.dit.go.th/otcc/content/hotnews_detail.php?hotnewId=83 (Thai)

Vietnam

Linh Bui, Allens

VCA to impose more severe penalties for competition violations

The Vietnam Competition Authority (the "**VCA**") will impose more severe penalties for competition violations from 15 September 2014 under a new Decree 71/2014/ND-CP of the Government dated 21 July 2014 (**"Decree 71**") which deals with breaches in the competition sector. The fines have doubled for violations relating to restraint of competition, abuse of dominant position and failure to make merger-control filings. The fines have been increased from 'up to 5%' to 'up to 10%' of the total revenue in the financial year prior to the year in which the violation was committed.

Under Decree 71, a failure to notify a merger transaction in Vietnam may subject each party to the transaction to a fine of up to 10% (increased from 1 to 3%) of their total revenue for the previous year. Decree 71 fails to clarify two major issues in respect of offshore foreign-to-foreign transactions. Firstly, whether these transactions must be notified to the VCA or not. Secondly, whether fines are calculated based on the foreign companies' total global revenue or only their Vietnam sourced revenue.

Recently the VCA seems to have taken a more aggressive view in respect of foreign-to-foreign transactions and recommends that foreign parties consider notifying in Vietnam to avoid any potential penalties. Our discussions with the VCA indicate that based on a technical reading of the law, global revenue of foreign entities will be used to calculate the fines in Vietnam, however, the VCA has not imposed such a fine to date.

Decree 71 also introduces a welcome change in respect of calculation of fines in respect of restraint of competition violations. Previously, these fines were calculated on the total revenue of the offender. Under Decree 71 such fines are determined based on the sales revenue in respect of the specific goods or services which were the subject of the agreement in restraint of competition and not all of the offender's products and services. The previous calculation based on the total revenue will only be used if the relevant sales revenue for the specific goods or services cannot be determined.