Asia Pacific Competition Law Bulletin

Introduction

Welcome to the August 2016 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), Rahmat Lim & Partners (Malaysia), Allen & Gledhill LLP (Singapore), Lee & Ko (South Korea) and Tsar & Tsai Law Firm (Taiwan). We hope you continue to find it a useful tool to keep track of antitrust developments across the Asia Pacific region.

In the area of antitrust, we report on the first criminal cartel proceedings to take place in Australia, as well as cartel cases in Indonesia and Malaysia. We report on abuse of dominance cases from Malaysia and Singapore.

Merger control occupies an increasingly large place in our Bulletin, with stories from Australia and Singapore, and a fine for failure to notify on time in India.

Competition authorities in China, Japan, New Zealand and Taiwan are consulting on draft policies and regulations.

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

Australia

Carolyn Oddie, Lisa Lucak and Deniz Kayis, Allens

First criminal cartel proceeding instituted in Australia against Nippon Yusen Kabushiki Kaisha

On 14 July 2016, criminal charges were filed in the Federal Court of Australia against Japanese shipping company Nippon Yusen Kabushiki Kaisha ("**NYK**") for criminal cartel conduct. This is the first criminal prosecution of cartel conduct in Australia, and follows an investigation by the Australian Competition and Consumer Commission ("**ACCC**") into NYK's transportation of imported vehicles between July 2009 and September 2012. NYK has pleaded guilty to the charges. NYK is one of the largest shipping companies globally, and has an Australian subsidiary.

In June 2009, two new criminal cartel offences were introduced into Australian law. While the ACCC investigates cartel conduct, it is the responsibility of the Commonwealth Director of Public Prosecutions ("**CDPP**") to prosecute criminal cartel offences in the Federal Court of Australia.

The CDPP charged the shipping company with a single offence of intentionally giving effect to cartel provisions in an arrangement or understanding with others in relation to the supply of ocean shipping services, knowing or believing that the arrangement or understanding contained cartel provisions.

NYK has already faced proceedings regarding the international shipping of vehicles in other jurisdictions. In 2014, in the US, NYK admitted to fixing prices, allocating customers, rigging bids and exchanging customer pricing information. The company was fined USD 59.4 million. In 2015, NYK admitted to having colluded on fourteen tenders with its competitors, and was fined USD 8.5 million.

The maximum penalty faced by NYK in Australia is the greater of:

- AUD 10 million (approximately USD 7.6 million);
- three times the value of the total benefit attributable to the offence; and
- if the value of the benefit cannot be determined, 10% of NYK's annual turnover in connection to its Australian operations.

The ACCC Chairman Rod Sims has stated that this is the first of many criminal prosecutions of cartel conduct, with another 10-12 investigations currently under way.

The matter is scheduled to return to court for directions on 12 September 2016.

Related links:

The ACCC's media release is available here.

Australian Competition Tribunal authorises Sea Swift's acquisition of Toll Marine's Northern Territory and far north Queensland marine freight assets

The Australian Competition Tribunal ("**Tribunal**") has affirmed its effectiveness as a merger clearance mechanism where an acquisition involves a "net public benefit". On 1 July 2016, the Tribunal granted authorisation for Sea Swift Pty Ltd ("**Sea Swift**") to acquire Toll Marine Logistics Australia's ("**TML**") Northern Territory and far north Queensland marine freight business. This followed a rejection of the proposed acquisition by the ACCC, which had decided to oppose the deal.

Sea Swift and TML provide marine freight services to remote communities in Australia's Northern Territory and Queensland. TML is a division of Toll Holdings Limited. Sea Swift proposed to acquire certain assets of TML's Northern Territory and far north Queensland marine freight business.

On 9 July 2015, the ACCC opposed the proposed acquisition. The ACCC concluded that the merger between Sea Swift and TML, the two largest suppliers of marine freight in the affected areas, would likely substantially lessen competition. Sea Swift subsequently sought merger clearance from the Tribunal.

On 1 July 2016, the Tribunal authorised the acquisition. Whilst reasons for the decision have not yet been released, it is likely that both parties' poor financial performance and TML's intention to exit the market played a key role. The authorisation is also contingent on a number of conditions, including a cap on future prices, continuation of scheduled services to remote communities, and enhanced access by other marine freight companies to landing facilities.

Direct application to the Tribunal for merger authorisation was introduced in Australia in 2007. This is only the second Tribunal determination under this process. It is important to note that the ACCC and the Tribunal apply different tests to merger clearance decisions. The ACCC considers whether the proposal would be likely to substantially lessen competition. In contrast, the Tribunal considers whether the proposed acquisition is likely to result in public benefits by examining the scenarios both with and without the proposed acquisition.

The decision highlights the potential utility of seeking merger clearance from the Tribunal for acquisitions involving public benefit, rather than seeking clearance from the ACCC. However, this particular acquisition involved a unique factual matrix, which is unlikely to be relevant to many other transactions.

Related links:

The Tribunal decision is available here. The ACCC's media release in response is available here.

China

Fay Zhou and Yuan Cheng, Linklaters

Fair Competition Review System – bringing down barriers to a unified Chinese market?

On 14 June 2016, the State Council, the highest executive organ of the Chinese government, published its *Opinion on Establishing A Fair Competition Review System during the Development of the Market System* ("**Opinion**").

The aim of the Opinion is to regulate the conduct of government bodies with a view to preventing policies that would otherwise exclude or limit competition. The State Council also requires public authorities to gradually abolish or revise existing rules and practices that create provincial hurdles to fair competition. Ultimately the aim of the Opinion is to ensure a single China national market rather than provincial/local barriers to trade across the country.

The Opinion imposes two over-arching rules on public authorities:

- policies and rules must not harm the exercise of lawful rights or increase any financial or legal burdens on undertakings without a clear basis in law or specific regulations; and
- government bodies shall not adopt policies or rules that limit competition in a way that contravenes the Anti-Monopoly Law ("**AML**").

The Opinion requires policy making bodies to conduct a fair competition review of new and existing rules and regulation that relate to the economic activities of undertakings. The State Council thus relies primarily on self-assessment by those public authorities – but requires a process of consultation with stakeholders and the public.

The Opinion also provides guidance on the elements which should be taken into account by public authorities in the review, including (1) barriers to market entry/exit; (2) any discriminatory pricing practices or subsidies in favour of locally produced goods; (3) scope of regulations relating to production and operational costs; and (4) role of public authorities in business conduct (e.g. whether there is any "state" compulsion on undertakings to engage in conducts in breach of the AML. The review will be conducted under the guidance and supervision of the Legislative Office of the State Council and the three central government competition authorities in China: the National Development and Reform Commission ("**NDRC**"), State Administration of Industry and Commerce, and the Ministry of Commerce.

Although the scope of the review is potentially very wide, it remains to be seen to what extent and how quickly significant changes are made nationwide to the existing practices of public authorities.

Consultation launched on the NDRC's draft guidelines on the calculation of fines

On 17 June 2016, the NDRC published for consultation the Draft Guidelines on the Calculation of Fines and Illegal Gains ("**Draft Guidelines**"), which would be applicable to all Chinese competition authorities once finalised.

The Draft Guidelines provide detailed guidance on the approach Chinese competition authorities will take in the calculation of fines for a contravention of the AML. The NDRC proposes to calculate fines in a two-step process:

- determining the basic amount. This would usually be the annual turnover generated by the sales of the relevant product in the year before the investigation started. The relevant geographic scope is all areas where the illegal conduct took place. If the illegal conduct is international, the authorities will limit the basic amount to Chinese domestic markets. As an alternative, the Draft Guidelines indicate that the authorities may use any relevant turnover for the calculation of the basic amount, for instance if the company's total turnover is significantly higher than the sales of the relevant product; and
- determining the base percentage as a multiplier to the basic amount. The authorities would examine the type and duration of the illegal conduct. An adjustment is made with a cap of 10%. The percentage starts at 3% for cartel behaviour and abuse of dominance, and 2% for other types of horizontal competition concerns and vertical restrictions such as Resale Price Maintenance. The percentage would then be increased or decreased depending on the duration and seriousness of the relevant illegal conducts, and whether there are any mitigating factors.

Under the Draft Guidelines, illegal gains are calculated as either (1) the actual income of the company minus assumed income (i.e. the income that the undertaking would have achieved without the illegal conduct); or (2) assumed costs (i.e. the costs that the undertaking would have incurred without the illegal conduct) minus actual costs. The Draft Guidelines go into further detail on how the authorities would calculate such elements to determine the overall "illegal gains".

Such guidance, if adopted, would bring certainty and would assist the business community and its legal advisors.

The consultation closed on 6 July 2016 and the NDRC received nearly 200 submissions from domestic and international antitrust authorities, businesses, trade associations, research institutes, law firms and individuals.

The Draft Guidelines (as well as the other draft guidelines being prepared, as reported previously in the APAC bulletin) are expected to be submitted to the Anti-Monopoly Committee of the State Council with an aim of finalisation and enactment before the end of 2016.

Hong Kong

Clara Ingen-Housz, Anna Mitchell and Marcus Pollard, Linklaters

Hong Kong Competition Commission confirms appointment of new Senior Executive Director

Rasul Butt, who was until 18 July 2016 the Acting Senior Executive Director at the Hong Kong Competition Commission, has been appointed as Senior Executive Director.

Mr Butt had been acting in that role when Rose Webb, the former Senior Executive Director took over the functions of Chief Executive Officer in April this year when Dr Stanley Wong resigned. This appointment confirms wider structural changes in the Commission.

With a strong legal background, Rasul Butt is a seasoned civil servant, with 15 years of experience at the Urban Renewal Authority, the government agency which is in charge of revitalising the older urban areas of Hong Kong. His experience in that sector may prove useful to the Competition Commission, which is widely expected to launch formal investigations in the building renovation and building maintenance sectors. The Commission recently released the results of its market study in these sectors, in which it found strong indicators of anti-competitive activity.

Related links:

The Competition Commission’s structure chart can be found here.

The Competition Commission’s study on the building renovation and building maintenance sectors can be accessed here.

India

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

CCI imposes penalty on Eli Lilly for failure to notify its acquisition of Novartis' animal health business

The Competition Commission of India ("**CCI**") has recently imposed a penalty of USD 149,692 on Eli Lilly for failing to notify its acquisition of Novartis' animal health business. The CCI's order provides clarity on certain important issues under the Indian merger control rules.

On its own initiative, the CCI had initiated an enquiry into the transaction. As a result, Eli Lilly decided to file a merger notification with the CCI. The CCI ultimately approved the transaction. However, penalty proceedings were initiated against Eli Lilly for failure to notify on time and for implementing the transaction prior to clearance ("**gun jumping**").

Eli Lilly argued that no penalty should be imposed on it as the transaction benefited from the *de minimis* exemption available under the Indian merger control rules for acquisitions where the target enterprise has Indian assets or Indian turnover below specified thresholds. The CCI observed that an unincorporated business division cannot be held to amount to an "enterprise" under the Competition Act and therefore, the *de minimis* exemption can only apply to the legal entity to which the target business division belonged which in the instant case exceeded the *de minimis* thresholds.

Further, Eli Lilly argued that although the transaction had closed globally, local closing had not taken place prior to the CCI's approval and therefore, there was no gun jumping. The CCI rejected this argument and observed that in the case of global transactions, global closing implies that the parties have ceased to behave independently, thereby defeating the entire purpose of the suspensory merger control regime.

Indonesia

Perdana Saputro, Widyawan & Partners

Telecom companies ordered to pay price fixing fines

Five telecom companies in Indonesia, which were originally fined in 2008 for fixing the price of SMS text messages, were told by the head of the Indonesian competition authority ("**KPPU**") to pay the 2008 fine, following the decision of the Indonesian Supreme Court which confirmed the KPPU's analysis and upheld the fine. The head of the KPPU noted that none of the five telecom companies had made any payment so far.

The incident highlights a common problem among competition authorities and regulators across the region, which sometimes struggle to enforce their decisions. However, the head of the KPPU made clear that further delay in payment could result in additional penalties being imposed on the telecom companies. The decision also illustrates the growing importance of KPPU in the regulatory landscape of Indonesia.

Japan

Kenji Ito and Aruto Kagami, Mori Hamada & Matsumoto

JFTC requested public comments on potential amendment to the administrative surcharge system

On 13 July 2016, the Japan Fair Trade Commission ("**JFTC**") published a summary report on issues concerning the potential amendment to the administrative surcharge (fines) system and launched a public consultation process.

Since February 2016, the JFTC has been considering potential amendments to the surcharge system, including the possibility of introducing the so-called "discretionary surcharge system". To that effect, the JFTC organised a study group consisting of prominent scholars, lawyers and businesses representatives.

The lack of flexibility in setting the amount of surcharge on a case-by-case basis has encouraged the JFTC to consider potential amendments to the administrative surcharge system. Under the current system, the amount of the surcharge is calculated by multiplying the sales amount of the goods or services by certain fixed rates (for example, in case of large-size manufacturing companies, the surcharge calculation rate is 10%).

In setting the amount of the surcharge, the JFTC cannot take into account factors such as the degree to which the parties cooperated with the JFTC during the investigation or the seriousness of the breach. In addition, the JFTC does not have discretion in determining the relevant sales. For example, in case of international cartels, the JFTC cannot impose a surcharge payment order upon a foreign company if such company does not have any domestic sales in or into Japan.

The JFTC report discusses potential issues in introducing a discretionary surcharge system such as:

- enabling the JFTC to determine the amount of relevant sales in a way it deems fit;
- giving the JFTC the power to increase or decrease the amount of surcharge based on the degree to which the parties cooperated with the JFTC during the investigation and the extent to which the parties were involved in the alleged violation; and
- introducing some form of settlement procedure in which the parties can receive some reduction in surcharge and benefit from a truncated, shorter procedure by admitting the violation.

Any interested party may submit an opinion before 31 August 2016.

Related links:

The call for submissions can be found here.

Malaysia

Raymond Yong and Penny Wong, Rahmat Lim & Partners

Malaysia Competition Commission fines MyEG for abuse of dominance

On 24 June 2016, the Malaysia Competition Commission ("**MyCC**") issued a Finding of Infringement under Section 40 of the Competition Act 2010 to My E.G. Services Berhad and My E.G. Commerce Sdn. Bhd. (together "**MyEG**") for abusing its dominant position in relation to the provision and management of online foreign workers permit renewal applications.

MyEG was found to have applied different trading conditions to equivalent transactions, a practice that has harmed competition in the market for the sale of mandatory insurance policies for online foreign workers permit renewal applications, in which MyEG Commerce is participating as an insurance agent for the online renewal applications.

The MyCC fined MyEG RM 2.2 million (approximately USD 545,300), and imposed the following directions on the company:

- to cease and desist immediately from imposing different conditions to equivalent transactions in the processing of the mandatory insurances for the online foreign workers permit renewal applications;
- to provide an efficient gateway for all its competitors in the market for the sale of the mandatory insurances and allow other competitors to compete at the same level within 60 days from the date of the decision; and
- to provide an undertaking in the form and manner acceptable to the MyCC to be fully compliant with the rules and regulations of the General Insurance Association of Malaysia within 60 days from the date of the decision.

MyEG has already appealed the decision to the Competition Appellate Tribunal.

Related links:

A copy of the MyCC's decision is available here.

High Court to hear judicial review appeal against Competition Tribunal judgment in airlines case

On 25 July 2016, the High Court of Kuala Lumpur granted MyCC leave to review the Competition Appellate Tribunal's decision to set aside the 2014 MyCC USD 5 million fine against AirAsia and Malaysia Airlines.

In February this year, the Competition Appellate Tribunal had ruled that MyCC in its 2014 fining decision had misinterpreted the agreement between the two airlines, that the agreement was a mere framework for collaboration; consequently, it did not breach the Competition Act. The February 2016 judgment, the first appeal of a MyCC infringement decision since the law came into force in 2010, was a major setback for the regulator.

Whilst the High Court of Kuala Lumpur has granted leave in this case, and will hear arguments by both parties, it is unclear whether the court will be ready and equipped to review the substance of the competition analysis in the case, or whether it will constrain itself to constitutional law argument.

Related links:

The February 2016 judgment of the Competition Appellate Tribunal can be found here.

Malaysia Competition Commission fines five logistics companies for price fixing

On 1 June 2016, the MyCC issued a Finding of Infringement against an information technology service provider to the shipping and logistics industry in the Penang area.

The information technology service provider, Containerchain, together with four container depot operators, Ayza Industries / Ayza Logistics, ICS Depot Services, E.A.E. Depot & Freight Forwarding and Prompt Dynamics (collectively referred to as the "**Container Depot Operators**") were found to have engaged in price-fixing activities.

The parties' concerted practice was a vertical arrangement which resulted in the Container Depot Operators increasing the depot gate charges imposed on their customers from RM 5 to RM 25 (from approximately USD 1.25 to USD 6.20). The Container Depot Operators also offered a fixed rebate of RM 5 to the hauliers in respect of the depot gate charges.

The Container Depot Operators had also entered into a horizontal price-fixing agreement in relation to the increase of the depot gate charges which had the object of harming competition in the market for the provision of empty container storage, maintenance and handling services within a 5 to 15 kilometre radius of the Penang port.

A total financial penalty of RM 645,770 (approximately USD 160,000) was imposed on the infringing companies and an additional daily penalty of RM 7,000 (approximately USD 1,730) if they fail to comply with the following directions:

- to cease and desist from implementing the agreed rate for the depot gate charges and rebate which arose from the anti-competitive conduct;
- to remove contract clauses which stipulated the depot gate charges and rebates;
- not to include in service contracts any clause which may allow the sharing of confidential information relating to any Container Depot Operator who has subscribed to Containerchain's system;
- to provide an undertaking in the form and manner acceptable to the MyCC to reconfigure the system to ensure that it is not being used for any anti-competitive conduct; and
- to determine independently by all Container Depot Operators who have subscribed to the Containerchain system all future prices and other trading conditions.

On 30 June 2016, Containerchain had provided an undertaking to the MyCC which was accepted.

Related links:

A copy of the MyCC's decision is available here.

New Zealand

Carolyn Oddie, Lisa Lucak and Lovelle D'Souza, Allens

NZCC consults on review of rules for regulated electricity, gas and airport services

On 16 June 2016, the New Zealand Commerce Commission ("**NZCC**") released its draft decisions in relation to its review of Input Methodologies, which are the rules and processes that apply to specified airport services, gas pipelines and electricity transmission and distribution systems regulated by the NZCC under the Commerce Act 1986. The NZCC must review the Input Methodologies at least every seven years. The draft decisions reveal a small number of targeted changes which the NZCC considers will best promote long-term benefits for consumers, while enhancing certainty and reducing compliance costs for the regulated sectors. The NZCC is seeking feedback on the draft decisions, with the review expected to be finalised by the end of 2016.

The main areas of reform are as follows:

- emerging technologies. A recurring theme in the NZCC's review is the impact of emerging technologies in the energy sector, such as solar photovoltaics and battery storage. The NZCC considers that the available evidence does not suggest that new technology will result in significant numbers of consumers disconnecting from electricity lines services in the short to medium term. However, the NZCC accepts that the impact of emerging technologies may be greater in the future. The NZCC therefore proposes to allow electricity lines companies to recover the cost of assets more quickly, as a precautionary measure;
- cost of capital. The most material change proposed to cost of capital methodologies is a reduction in the allowed rate of return for gas pipeline companies, which is proposed to match that of electricity companies, given their similar risk profiles; and
- price and revenue caps. Another key change proposed is a shift from a price cap to a revenue cap for electricity distributors. The NZCC considers that a price cap may reduce energy and pricing efficiency. It is seeking feedback in relation to the Electricity Authority's concern that a revenue cap may reduce incentives for efficient prices.

Related links:

The draft decisions, draft amended determinations and a report on the Input Methodologies review can be found here.

Singapore

Daren Shiau and Elsa Chen, Allen & Gledhill LLP

CCS clears the acquisition of GAPL by Heineken

On 19 July 2016, the Competition Commission of Singapore ("**CCS**") announced that it had cleared the acquisition by Heineken International B.V. of the entire issued and outstanding ordinary share capital of GAPL Pte. Ltd. which Heineken (through its subsidiary, Heineken Asia Pacific Pte. Ltd.) did not already hold. In its assessment, the CCS concluded that the transaction has not substantially lessened competition in the supply of beer in Singapore. The transaction was notified to the CCS on 12 November 2015.

In its assessment, the CCS considered that the supply chain of beers can be divided into three functional levels, namely: (i) brand ownership; (ii) brand usage rights; and (iii) production and distribution of beer brands. The CCS further noted that the transaction only resulted in a change in the second functional level (i.e. brand usage rights). The CCS was of the view that the relevant market for this assessment was the supply of beers (which includes ales, lagers and stouts) in Singapore, including both the duty-paid and duty-free segments, and noted that regardless of whether the market comprises only stouts or includes other beers such as ales and lagers, the competitive assessment remained the same.

Ultimately, the CCS concluded that the transaction has not led to a substantial lessening of competition in the relevant market on the basis that:

- barriers to entry remain effectively the same post-transaction;
- the transaction has not resulted in any change in the relative bargaining power between suppliers and customers. In particular, the production and distribution of Guinness Stout and ABC Extra Stout had already been sub-licensed to APBS, a wholly-owned subsidiary within the Heineken Group, before the transaction; and
- the transaction has not resulted in an addition of beer brands to the Heineken Group's portfolio in Singapore.

Related links:

The CCS' media release can be found here.

CCS' investigations in the supply of lift spare parts

On 14 July 2016, the CCS announced that it is investigating restrictive industry practices in the supply of lift spare parts in Housing & Development Board ("**HDB**") estates. The investigation was initially triggered by a complaint in relation to a supplier of a specific brand of lift parts withholding supply of lift spare parts to a third-party lift maintenance contractor.

The CCS cautioned that a refusal by a dominant or sole supplier to supply certain essential products or services, that cannot otherwise be obtained, can be illegal and in breach of Section 47 of the Competition Act, which prohibits abuse of a dominant position, as these might prevent other lift maintenance contractors from effectively competing for contracts to maintain and service lifts of that particular brand in Singapore.

Further to the CCS' investigations, on 12 May 2016, E M Services Pte. Ltd. came forward to provide commitments to supply BLT lift spare parts in Singapore to third-party lift maintenance contractors in Singapore. Following feedback from the public consultation conducted by the CCS from 22 January to 5 February 2016, the CCS considered that the commitments fully address the competition concerns raised by the CCS.

This investigation follows the CCS' public consultation in January 2016 on the proposed commitment by a supplier of a specific brand of lift parts, against whom the CCS had received a complaint which triggered the initial investigation. The proposed commitment was in relation to the supplier amending its practice of withholding supply of lift spare parts, of a specific brand, to companies seeking to procure these parts to provide lift maintenance services for the relevant lifts in Singapore. The proposed voluntary commitment required the supplier to undertake to sell lift spare parts of the specific brand to purchasers subject to certain terms and conditions relating to, among others:

- purchasing terms such as pricing, delivery time and warranty period;
- confirmation that the purchaser is adequately qualified to service the said lifts;
- clarifying liability in the event of any mishaps, injuries or loss that arise through the purchaser's negligence;
- ensuring that the lift spare parts purchased are not modified or used for other lift brands; and
- seeking consent from the owner of the relevant lift to be repaired.

Related links:

The CCS' media release on the July 2016 investigation can be found here.

The CCS' media release on the January 2016 public consultation can be found here.

CCS merger clearance decision on wholesale broking industry

The CCS announced on 20 July 2016 that it had cleared the proposed acquisition by Tullett Prebon PLC of ICAP's global wholesale broking business. The CCS concluded that the proposed transaction, if carried into effect, is unlikely to lead to a substantial lessening of competition for the provision of wholesale hybrid broking services in Singapore and the global provision of real-time and periodic pricing data into Singapore.

After assessing Tullett Prebon and ICAP's respective products and services offered in Singapore, the CCS determined that the areas of overlap between the parties were: (i) the provision of wholesale hybrid broking services in Singapore; and (ii) the APAC-wide, if not worldwide, provision of real-time and periodic pricing data into Singapore for the following products in which the parties overlap: (i) Interest Rate Swaps; (ii) Forward FX; (iii) Cash Deposits; and (iv) Oil.

After reviewing the parties' submissions and feedback from customers and competitors, the CCS concluded that the proposed transaction, if carried into effect, is unlikely to result in a substantial lessening of competition in the relevant markets on the basis that:

- post-transaction, there will still be sufficient competition from other wholesale intermediaries and trading channels in relation to the provision of broking services in each of the overlapping products;
- the pre-existing relationships with customers enable other wholesale intermediaries to expand their broking services, which ensures a low switching cost for customers;
- countervailing buyer power or the ability of buyers to extract price concessions from the wholesaler intermediaries is relatively strong; and
- the parties' strength in relation to the provision of pricing data is linked to their strength in the underlying hybrid broking services provided. As such, as with wholesale hybrid broking services, competitors are able to expand and countervailing buyer power is relatively strong with respect to the provision of pricing data by the parties.

The proposed transaction has also been notified to competition authorities in Australia, the United States and the United Kingdom. In arriving at its decision, the CCS considered the restructuring of the proposed transaction required to address the US Department of Justice's concerns, and the divestment of ICAP's London-based oil trading desks to address the UK Competition and Market Authority's concerns.

Related links:

The CCS' media release can be found here.

South Korea

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

The KFTC's performance review for 2015

On 11 July 2016, the Korea Fair Trade Commission ("**KFTC**") issued a White Paper outlining its performance for 2015. After looking at the number of cases filed and the administrative fines levied, it appears the KFTC continues to be very vigorous in its enforcement of the Monopoly Regulation and Fair Trade Act ("**MRFTA**"), especially in relation to cartels. It appears that 2014 was an anomaly with a large number of cartel cases filed resulting in a very significant total of administrative fines being imposed. Looking at 2015, in light of a 5 year average, the KFTC has not lessened its enforcement of the MRFTA and other related laws. The key items that stand out in its assessment of 2015 are as follows:

- in 2015, the KFTC decided 4367 cases, a 7.1% increase over the total number of cases decided in 2014 which was 4079. Among these cases, 88 were cartel-related. The total amount of administrative fines levied in 2015 was KRW 588.9 billion (approximately USD 531 million), of which cartel-related fines comprised 85%. This constitutes a 26.7% decrease from 2014. However, as a large number of cartel cases were decided in 2014, the total amount of administrative fines imposed in 2015, is close to the 5-year average. Additionally, the 5 biggest cases decided by the KFTC in 2015 are all cartel related cases;
- previously, consent orders were filed in case of merger review and abuse of dominance cases. In 2015 a consent order was filed for unfair advertisements in mobile telecommunication market. This was the first consent order case after the consent order system was introduced in the Fair Labelling and Advertising Act. This also shows that the KFTC is starting to frequently issue consent orders for a variety of cases not only involving merger review or abuse of dominance;
- in terms of sheer number of cases decided by the KFTC, the largest increase was reflected in cases involving the enforcement of subcontractor laws. The KFTC decided numerous cases on behalf of SMEs seeking to enforce subcontractor laws against large domestic conglomerates; and
- regarding litigation filed against the KFTC, the KFTC continued its winning streak. In 2015, the KFTC won 73.8% of all cases filed against it. Of the remaining 26.2%, only 12.3% of the cases were completely overturned, with 13.9% resulting in only a partial win/loss.

Taiwan

Matt Liu and Albert Liao, Tsar & Tsai Law Firm

TFTC announces additional exemptions for merger filing obligations

Article 12 of the Taiwan Fair Trade Act ("**TFTA**") prescribes five scenarios where the parties are exempted from the obligation to file a merger notification with the Taiwan Fair Trade Commission ("**TFTC**") when a filing threshold is triggered. The same provision authorises the TFTC to announce additional exemptions when necessary. On July 18 2016, the TFTC issued a ruling announcing four additional exemptions.

The five exemptions prescribed under Article 12 are: (1) where any of the enterprises participating in a merger already holds no less than 50% of the voting shares or capital contribution of another enterprise in the merger and merges with such other enterprise; (2) where enterprises of which 50% or more of the voting shares or capital contribution are held by the same enterprise merge; (3) where an enterprise assigns all or a principal part of its business or assets, or all or part of any part of its business that could be separately operated, to another enterprise newly established by the former enterprise solely; (4) where an enterprise redeems its shares held by shareholders under other laws and regulations so that its original shareholders hold the shares or capital contributions of such enterprise more than 1/3 of the total number of voting shares or total capital of such enterprise; and (5) where a single enterprise reinvests to establish a subsidiary and holds 100% shares or capital contribution of such a subsidiary.

Since controlling and subordinate relation can be established other than through mere voting shares in another company, in its new ruling, the TFTC announces four additional exemptions for a merger between enterprises with controlling and subordinate relation, namely: (1) where the enterprises participating in a merger have a controlling and subordinate relation between them; (2) where the enterprises participating in a merger are controlled by the same third-party enterprise; (3) where an enterprise transfers part or all of the voting shares or capital contribution of a third-party company it holds to another enterprise with which it has a controlling and subordinate relation; and (4) where an enterprise transfers part or all of the voting shares or capital contribution of a third-party company it holds to another enterprise controlled by the same third-party enterprise.

This ruling greatly expands the number of scenarios in which parties are exempted from their merger filing obligations to the TFTC.